S. HRG. 98-1289

UNDERCOVER OPERATIONS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 804

A BILL TO REFORM THE FEDERAL CRIMINAL LAWS BY ESTABLISHING CERTAIN STANDARDS AND LIMITS FOR CONDUCTING FEDERAL UNDERCOVER OPERATIONS AND ACTIVITIES, AND FOR OTHER PURPOSES

MAY 16, 1984

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UNDERCOVER OPERATIONS ACT

WEDNESDAY, MAY 16, 1984

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in rooms SD-106 and SD-226, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. presiding.

Present: Senators Thurmond, Denton, Specter, Biden, and Metzenbaum.

Staff present: Steven J. Metalitz, staff director (Subcommittee on Patents, Copyrights and Trademarks); Beverly McKittrick, counsel (Subcommittee on Criminal Law); Joel S. Lisker, chief counsel (Subcommittee on Security and Terrorism); and John Podesta, counsel, Senator Patrick Leahy.

Senator MATHIAS. The subcommittee will come to order. We are pleased that the chairman of the full committee is here this morning, and I turn first to him if he has any remarks.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. Thank you, Mr. Chairman. I have no statement to make except just welcome these witnesses here and thank them for their appearance. This is a very important matter.

I have another committee meeting and then I have to open the Senate. So I will not be here very long, but I will read your testimony and want you to know that we appreciate your presence.

Thank you, Mr. Chairman.

OPENING STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Thank you, Mr. Chairman.

This morning the Subcommittee on Criminal Law of the Senate Judiciary Committee begins hearings on S. 804, the Undercover Operations Act. I want to thank the chairman of the subcommittee, Senator Laxalt, for his cooperation in arranging this hearing and for the opportunity to conduct the hearing in his absence.

This is the first hearing to be held on the bill; but it is, of course, far from the first time that the Senate has examined the issues that are raised by this legislation. During the 97th Congress, the Senate established a select committee and charged it with the task of conducting the most searching inquiry into Federal law enforcement undercover operations that has ever been undertaken by the Congress. There were a dozen public hearings. There were private interviews. There were depositions. There was the perusal of many thousands of pages of documents. And in the course of this investigation, the committee examined the way in which the law enforcement agencies of the Department of Justice actually conducted undercover operations.

The select committee studied the directives and guidelines that those agencies had promulgated to govern the use of undercover techniques. It reviewed the record of the successes and failures, of the benefits and costs that resulted from undercover operations.

In December 1982, the select committee unanimously approved a detailed final report that made numerous specific recommendations for legislation to increase the effectiveness of undercover operations, while strengthening the safeguards for privacy rights and civil liberties.

These recommendations have been embodied in S. 804, which was introduced March 14, 1983. The bill had the support and cosponsorship of the vice chairman of the select committee, Senator Huddleston, and of five other members of the select committee.

Events in the months that have elapsed since the select committee concluded its work have underscored the need for the Senate to consider legislation on the topic of undercover operations. The undercover operation is, of course, a powerful weapon for law enforcement. Techniques of deception allow the authorities to bring to light conspiracies that would otherwise escape attention. For the detection of consensual crimes—trafficking in contraband or stolen goods or giving and taking brides and perversions of public trust—the undercover weapon often appears to be uniquely well suited.

But the use of undercover techniques also brings with it serious risks. More frequently and more urgently than ever the charge is heard that the undercover weapon has been misdirected or has misfired. The curtain that deceptive tactics can pierce may shield a conspiracy or it may simply protect the privacy of an innocent citizen. The Government's unacknowledged presence may ultimately preserve public safety but it may also intrude on precincts from which the State ought to be fenced out. The corrupt informant, always tempted to twist the project to his own ends, may betray his government as well as his erstwhile confederates. As more and more Federal law enforcement agents are called upon to play act in the performance of their duties, the need for clear legislative standards for the directors and script writers becomes more and more compelling.

The Federal Bureau of Investigation in the undercover guidelines that it has adopted has made what I think is a sincere effort to articulate those standards. But the Undercover Operations Act proceeds from the premise that these standards are so important that they ought to be written into the statute books rather than relegated to the netherworld of administrative rules that can be changed by a stroke of the pen and without sufficient notice.

S. 804 would, for the first time, give Justice Department law enforcement agencies express statutory authority to engage in undercover operations. It would grant these agencies permanent exemptions for some of the legal restrictions that have impeded use of the undercover technique. But these authorizations and waivers would be conditioned on the adoption of detailed internal guidelines addressing a specified range of issues. Furthermore, the Undercover Operations Act would prohibit undercover operations that fail to meet specified threshold standards of justification. The bill would clarify the rights of innocent victims of undercover operations to financial compensation from the Government. And it would deter some of the worst potential excesses of the undercover technique, by reforming and rationalizing the affirmative defense of entrapment.

With today's hearing, the proposals contained in S. 804 will begin to get the careful scrutiny that they deserve. The provisions of the Undercover Operations Act resulted from a consensus among the members of the select committee that the time had come for Congress to speak on this issue that has such important implications for effective law enforcement and for civil liberties. Although the members of the select committee have spoken with one voice, we all recognize that our statement could be improved upon. We welcome the constructive comments and suggestions of law enforcement agencies, legal scholars, concerned interest groups, and our colleagues in the Congress. We will need all these perspectives on the issue if we are to define the boundaries of the common ground from which the legislative process can usefully proceed.

Accordingly, it is fitting that the first witness this morning will be the distinguished chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Representative Don Edwards of California. Following Representative Edwards, we will hear from two men who can speak authoritatively for the administration on this issue, with particular regard to the effect of S. 804 on law enforcement activities: Judge William Webster, Director of the Federal Bureau of Investigation, and D. Lowell Jensen, Associate Attorney General of the United States. Next, we will take the testimony of a witness who can claim unsurpassed familiarity with the record of the need for this legislation, and a man to whom I feel personally greatly indebted, the former chief counsel of the Senate Select Committee on Undercover Operations, Mr. James Neal. Unfortunately, Malcolm Wheeler, who served as chief counsel after Mr. Neal's departure, is ill today, and we very much regret that he will be unable to join us.

Finally, we will have a panel of public witnesses who will bring diverse perspectives to bear on some of the particularly controversial aspects of the bill, including the provisions regarding the most highly sensitive undercover operations.

Now, before we ask Representative Edwards to begin, I would like to incorporate in the record at this point some explanatory materials concerning the legislation before us. These materials include the text of S. 804, a staff memorandum summarizing its provisions, excerpts from the final report of the select committee which set forth the committee's legislative recommendations and the analysis underlying them.

I will also note for the record that we have solicited the written views of several legal scholars and law enforcement professionals on the matters addressed by the bill and they will be included at an appropriate point in the record.

[The prepared statement of Senator Leahy, the text of S. 804, the staff summary of S. 804, and excerpts from the select committee's final report follow:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

There was once a time in my life when I had every hope that crime could be successfully fought with honest and well-trained policemen on the street corners of our towns and cities. As a county prosecutor in a rural state, this seemed a reasonable hope.

Ten years later I see that we need a much broader range of tools to fight crime, for the problem of crime is no longer simply the aberration of a man gone wrong, but often the product of organization and planning by people whose subtlety and care can make normal enforcement methods ineffective.

I recognize today that undercover operations are sometimes a necessary weapon against the modern criminal operation, and as a result I have endorsed S. 804, but with particular reservations. Though undercover operations will surely continue to be necessary on occasion in the future, their potential to harm the fabric of public trust gave me some pause—and frankly I think that a sense of doubt and hesitation in this area is healthy.

Two thorough investigations by the Congress concluded that we would be far better off if Congress established standards and guidelines for undercover activities than we would in relying on general law and the all-too-changeable sense of propriety that governs the law enforcement philosophy at the Department of Justice from Administration to Administration.

We need a bill because we need guidelines that will protect individual citizens from the excessive zeal of an operation that wanders from its rightful goal and places the value of apparent success over the value of individual liberty and privacy.

This bill makes a good start by setting standards for targeting and then defining objectives and operational responsibilities.

But the standards for targeting ought to be tightened and we ought to dash the impression that the standards for investigating government officials will be any higher than for any other citizen. To allow any other interpretation would be to miss the whole meaning of Abscam. And the bill ought to apply to all federal law enforcement agencies, not just the Dapartment of Justice.

And there is one very crucial concern that goes to the heart of law enforcement policy in an open society, and that is the use of the media or the clergy as part of an undercover scheme. We like to think that one of the most important qualities of an open society like ours is that the government cannot manipulate the press, and that if it tries, the press will fight back.

Undercover operations that depend, even in small part, on subversion of the media cannot benefit the nation by their results, however spectacular in the short run. Fighting subtle criminals in our modern age means using modern tools, and this bill acknowledges that need. But we must never lose sight of the genius within our system of government—and the heart of that genius is our ability to examine those who govern and to speak to each other about what we find.

Let us pass a strong and bill, but let's make sure that it's a bill that can strike at crime without hobbling any of our valued freedoms.

II

98TH CONGRESS
1ST SESSION

S. 804

To reform the Federal criminal laws by establishing certain standards and limits for conducting Federal undercover operations and activities, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 14, 1983

Mr. MATHIAS (for himself, Mr. HUDDLESTON, Mr. RUDMAN, Mr. INOUYE, Mr. LEAHY, Mr. DECONCINI, and Mr. SIMPSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform the Federal criminal laws by establishing certain standards and limits for conducting Federal undercover operations and activities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Undercover Operations Act of 1983".

SEC. 2. (a) Part II of title 18, United States Code, is amended by adding at the end thereof the following new chapter:

“CHAPTER 239—UNDERCOVER OPERATIONS AND ACTIVITIES

“Sec.

“3801. Undercover operations generally; Department of Justice guidelines.
“3802. Establishment of an undercover operation; authority.
“3803. Limits on undercover operations; standards for selecting targets.
“3804. Tort claim arising out of illegal undercover operation.
“3805. Annual report to Congress.

“§ 3801. Undercover operations generally; Department of Justice guidelines

“(a) The Attorney General shall have authority to authorize appropriate law enforcement components of the Department of Justice to conduct undercover operations under his direction, in accordance with the procedures and guidelines established by this chapter and any other applicable provision of law.

“(b) The Attorney General shall issue, maintain, and enforce a set of guidelines governing the undercover operations of each law enforcement component of the Department of Justice which is authorized to conduct undercover operations. Such guidelines shall include provisions which specify—

“(1) the procedures to be followed to initiate and to renew the authorization for an undercover operation;

“(2) the procedures to be followed to extend the time, increase the funds, or expand the geographic or subject-matter scope of an undercover operation;

"(3) the procedures to be followed to terminate an undercover operation;

"(4) the standards to be employed, consistent with this chapter and all other applicable provisions of law, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

"(5) the standards to be employed, consistent with this chapter and all other applicable provisions of law, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime; and

"(6) the functions, powers, composition, and voting procedures of an Undercover Operations Review Committee for each such law enforcement component, each of which shall consist of at least six voting members, at least one of whom is an Assistant Director of the Federal Bureau of Investigation and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice.

"(c) The Attorney General shall submit in writing to the Senate Committee on the Judiciary and the House Committee on the Judiciary, at least thirty days before it is promulgated, every guideline issued pursuant to this section and every amendment to, or deletion or formal interpretation of, any such guideline.

"§ 3802. Establishment of an undercover operation; authority

"Pursuant to this chapter and when reasonably necessary to the implementation of an authorized undercover operation, a law enforcement component of the Department of Justice shall have the authority—

"(a) to purchase or lease property, supplies, services, equipment, buildings or facilities, to construct or to alter buildings or facilities, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States;

"(b) to establish and to operate proprietaries;

"(c) to use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary: *Provided, however,* That the balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, must be deposited in the Treasury of the United States as miscellaneous receipts: *Provided further,* That proceeds from such a proprietary may not be used to offset any other expenses of the undercover operation, and that all proceeds recovered or generated other than by the proprietary must be deposited in the Treasury of the United States as miscellaneous receipts;

"(d) to deposit, in banks or in other financial institutions, funds appropriated by Congress for undercover operations; and

"(e) to engage the services of cooperative individuals or entities in aid of undercover operations, and, upon the prior written approval of the Attorney General or of the Deputy Attorney General, to execute agreements to reimburse those individuals or entities for their services and for losses incurred by them as a direct result of such operations.

"§ 3803. Limits on undercover operations; standards for selecting targets

"(a) No law enforcement component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except in accordance with the following standards:

"(1) When the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, there shall be a finding that there is reasonable suspicion that the individual has engaged, is engaging, or is likely to engage in criminal activity.

"(2) When the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, there shall be a finding that there is reasonable suspicion that the operation will detect past, ongoing, or planned criminal activity of that specified type. If, during the course of such an operation, agents of the law enforcement component wish to offer to a specific individual who is identified in advance of the offer an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion that the targeted individual has engaged, is engaging, or is likely to engage in criminal activity.

"(3) When a Government agent, informant, or cooperating individual will infiltrate any political, governmental, religious, or news media organization or entity, there shall be a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality.

"(4) When a Government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person, there shall be a finding that there is probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality.

"(b) All findings required to be made by subsection (a) shall be made by the Undercover Operations Review Committee for the appropriate law enforcement component, following procedures to be specified in the guidelines for such component which have been promulgated pursuant to this chapter. However, such guidelines may authorize findings of reasonable suspicion, as required by subsections (a)(1) and (a)(2), to be made by the head of the field office in charge, following procedures specified in such guidelines, if such a finding of reasonable suspicion is accompanied by a finding that none of the following circumstances are present or can reasonably be expected to materialize during the course of the undercover operation:

"(1) the undercover operation will involve an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a religious or political organization, or the activities of the news media;

"(2) the undercover operation will involve untrue representations by an undercover employee or cooperating private individual concerning the activities or involvement of an innocent person;

"(3) an undercover employee or cooperating private individual will engage in any activity that is proscribed by Federal, State, or local law as a felony or that is otherwise a serious crime except for activity involving criminal liability for the purchase of stolen or contraband goods or for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary;

"(4) an undercover employee or cooperating private individual will seek to supply an item or service that would be reasonably unavailable to criminal actors but for the participation of the Government;

"(5) an undercover employee or cooperating private individual will run a significant risk of being arrested and seeking to continue in an undercover capacity;

"(6) an undercover employee or cooperating private individual will be required to give sworn testimony in any proceeding in an undercover capacity;

"(7) an undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his lawyer;

"(8) an undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

"(9) a request for information will be made by an undercover employee or cooperating individual to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

"(10) a request for information will be made by an undercover employee or cooperating private individual to a member of the news media concerning any individual with whom the newsman is known to have a professional or confidential relationship;

"(11) the undercover operation will be used to infiltrate a group under investigation as part of a domestic security investigation, or to recruit a person from within such a group as an informant; and

"(12) there may be a significant risk of violence or physical injury to individuals or a significant risk of financial loss to an innocent individual.

"(c) Notwithstanding the provisions of subsection (b), the guidelines for a law enforcement component may provide that, when—

"(1) the initiation, expansion, extension, or renewal of an undercover operation is necessary to protect life or to prevent other serious harm; and

"(2) exigent circumstances make it impossible, before the harm is likely to occur, to obtain the authorization that would otherwise be required,

the head of the field office in charge may approve the operation upon his finding that the applicable requirements of subsection (a) have been met. A written application for approval must then be forwarded, together with the initial finding and a written description of the exigent circumstances, to the appropriate Undercover Operations Review Committee at the earliest possible opportunity, and in any event within forty-eight hours of the initiation, expansion, extension, or renewal of the operation. If the subsequent written application for approval is denied, a full written report of all activity undertaken during the course of the operation must be submitted to the head of the component and to the Attorney General.

"(d) All findings required to be made by this section shall be made in writing, and shall include a statement of the specific facts or circumstances upon which the finding is based.

"(e) Failure to comply with the provisions of this section shall not provide a defense in any criminal prosecution or create any civil claim for relief.

"§ 3804. Tort claim arising out of illegal undercover operation

"(a) Any person who suffers injury to his person or property, or death, which is caused by—

"(1) conduct which violates a Federal or State criminal statute, and which is committed by—

"(A) a Federal employee, or by any person acting at the direction of or with the prior acquiescence of a Federal law enforcement agent, during the course of and in furtherance of a Department of Justice undercover operation; or

"(B) a Federal employee, or by any informant or other cooperating private individual, who was enabled to commit the conduct by his participation in a Federal undercover operation; or

"(2) negligence on the part of Federal employees in the supervision or exercise of control over an undercover operation, shall have a cause of action against the United States for compensatory damages for such injury or death. No action may be brought under this section for injury caused by operational or management decisions relating to the conduct of the undercover operation.

"(b) The district courts shall have original jurisdiction of all civil actions arising under this section.

"(c) The provisions of chapter 171 of title 28, United States Code, shall apply to claims arising under this section.

"§ 3805. Annual report to Congress

"(a) The Attorney General shall annually submit to the Senate Committee on the Judiciary and to the House Committee on the Judiciary a written report on all undercover operations—

"(1) that were terminated during the preceding calendar year;

"(2) that were terminated during any prior year and in which, during the calendar year preceding the report, the operations resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision; or

"(3) that were first approved by the law enforcement component involved more than two years before the date of the annual report.

"(b) The annual report shall include the following information for each undercover operation:

"(1) the date on which initiation of the operation was approved under the undercover guidelines;

"(2) the name and position of the ranking person who granted approval to initiate the operation;

"(3) the number of Federal law enforcement agents who worked as undercover agents in the operation during each year of the existence of the operation;

"(4) each date on which an extension of time, increase of funds, or expansion of geographic or subject matter scope of the operation was approved under the undercover guidelines;

"(5) the name and position of each ranking person who approved each extension of time, increase of funds, or expansion of geographic or subject matter scope of the operation under the undercover guidelines;

"(6) the date on which termination of the operation was approved under the undercover guidelines;

"(7) the name and position of the ranking person who approved the termination of the operation;

"(8) the date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

"(9) the arrests made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

"(10) the indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

"(11) the expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report; and

"(12) a description of each jury verdict, sentence, judgment of dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.".

(b) The table of chapters for part II of title 18, United States Code, is amended by adding at the end thereof the following new item:

"239. Undercover operations and activities.".

SEC. 3. (a) Chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"§ 16. Entrapment

"(a) It shall be an affirmative defense to a prosecution under any Federal statute that a Federal law enforcement agent, or a private party acting under the direction of or with the prior approval of Federal law enforcement authorities, induced the defendant to commit an offense, and that the inducement was accomplished using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense.

"(b) The defense provided by this section shall be deemed to have been established by a showing that the defendant committed the offense because a law enforcement agent, or a private party acting under the direction of or with the prior approval of law enforcement authorities—

"(1) threatened harm to the person or property of any individual;

"(2) manipulated the personal, economic, or vocational situation of the defendant with the purpose and effect of increasing the likelihood of his committing that offense; or

"(3) provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without Government participation.

"(c) The defense provided by this section must be established by a preponderance of the evidence and shall be determined by the court.".

(b) The table of sections for chapter 1 of title 18, United States Code, is amended by adding at the end thereof the following:

"16. Entrapment.".

SEC. 4. (a) Section 2680(a) of title 28, United States Code, is amended by striking out "Any claim" and inserting in lieu thereof "Except as provided in section 3804 of title 18, United States Code, any claim".

(b) Section 2680(h) of title 28, United States Code, is amended by striking out "Any claim" and inserting in lieu thereof "Except as provided in section 3804 of title 18, United States Code, any claim".

○

SUMMARY OF PROVISIONS OF UNDERCOVER OPERATIONS ACT OF 1983

NOTE: The provisions of the Undercover Operations Act of 1983 are based upon the legislative recommendations of the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice (the "Select Committee"). These recommendations are summarized in Chapter Four of the Select Committee's Final Report (S. Rep. 97-682), and discussed in more detail in Chapter Eight of that report.

The Undercover Operations Act of 1983 consists of six basic features:

(1) authorization for undercover operations;

(2) limited exemption of undercover operations from certain legal restrictions;

(3) administrative guidelines and reporting requirements;

(4) prohibited undercover operations (threshold requirements);

(5) compensation for injuries;

(6) statutory entrapment defense.

I. AUTHORIZATION FOR UNDERCOVER OPERATIONS

(*See* proposed 18 U.S.C. Sec. 3801(a).)

Although law enforcement components of the Department of Justice have increasingly relied on undercover investigative techniques in recent years, there is no express statutory authority for these agencies to engage in undercover operations. Certain aspects of undercover activity (e.g., procuring false identification, operating proprietary businesses) may in fact be contrary to specific prohibitions of Federal law. Rather than continue the present reliance on strained interpretations of various statutes to legitimize undercover operations, the Undercover Operations Act would explicitly declare the authority of Justice Department agencies to engage in law enforcement undercover activity, subject to compliance with applicable law, including the strictures of the Act itself.

II. LIMITED EXEMPTION FROM LEGAL RESTRICTIONS

(*See* proposed 18 U.S.C. Sec. 3802)

Some Federal laws, while serving a useful purpose, inhibit or foreclose the use of undercover techniques. The Federal Bureau of Investigations (FBI) has received temporary exemptions from some of these laws at various times, beginning in 1978. The Undercover Operations Act would provide limited permanent exemptions from these restrictions for all Justice Department components engaged in undercover operations, in the context of increased administrative control and Congressional oversight of these activities.

Five major types of restrictions are involved.

A. Procurement, leasing and contracting

As a rule, Federal law prohibits government agencies from entering into multi-year leases of property or from entering into any property leases in Washington, D.C. Government agencies are also required to insert into all contracts specified clauses concerning conflicts of interest, access to records, and other matters, and are prevented from purchasing real property in some instances.

It is often necessary for an entity such as an undercover proprietary to lease or purchase property, or to contract for goods and services, in the context of an undercover operation. The exemptions provided by proposed section 3802(a) would put these transactions on a sound legal footing.

B. Establishment of proprietaries

Commonly, law enforcement agencies set up businesses as fronts for the conduct of an undercover operation. The legal authority of a Federal law enforcement agency to create a corporation without Congressional approval is quite dubious. Proposed section 3802(b) would clarify the authority to establish and operate proprietaries.

C. Use of income to offset expenses

Federal law requires that all funds received by any government agency be paid into the Treasury "without any abatement or deduction." Strict application of this requirement to undercover operations, since the expiration on February 1, 1982 of a temporary exemption, has sharply curtailed use of the undercover technique, because all expenses of undercover businesses must be paid from appropriated funds, regardless of any income generated by the business itself.

Proposed section 3802(c) would provide a limited exemption from this restriction. Proceeds generated by the operation of a proprietary may be used to offset reasonable and necessary expenses of that proprietary, but not of any other aspect of the undercover operation, nor of other undercover operations. All other proceeds, and all "profit" from the proprietary, must be deposited in the Treasury. These provisions would increase the efficiency and reduce the public expense of undercover operations, while retaining necessary fiscal controls.

D. Bank deposits

Federal officers are generally prohibited by law from depositing public funds in a bank. Yet this is often necessary in an undercover operation, either to maintain the cover of agents or of proprietaries, or to allow undercover operations to demonstrate their financial capabilities to would-be cohorts. Exempting undercover operations from the generally applicable strictures, as in proposed Section 3802(d), would not threaten the purposes underlying these statutes, and would remove an unnecessary impediment to vigorous law enforcement.

E. Indemnification of cooperating parties

The cooperation of legitimate businesses -- banks, insurance companies, and other firms -- is vital to the success of many undercover operations. But such cooperation involves risks, and many businesses are deterred from assisting undercover operations by the prospect of potential financial liability. Proposed section 3802(e) would authorize the Justice Department, with the personal written approval of the Attorney General or Deputy Attorney General, to enter into agreements indemnifying cooperative individuals or entities for their services and for losses incurred.

Finally, it should be noted that the proposed exemptions from legal restrictions are not automatic. A law enforcement component could avail itself of these authorities only when reasonably necessary to carry out a properly authorized undercover operation, in accordance with agency guidelines and other provisions of law.

III. ADMINISTRATIVE GUIDELINES AND REPORTING REQUIREMENTS

(See proposed 18 U.S.C. Sec. 3801 (b) and (c), and 3805)

While the FBI has, in recent years, promulgated detailed guidelines for undercover operations, other Justice Department agencies which use this technique have far less comprehensive regulations; and there is no statutory requirement that any such agency have any guidelines. These sections of the Undercover Operations Act would require the Attorney General to promulgate guidelines for each law enforcement component which is authorized to conduct undercover operations. While the details of the guidelines would be left to the Attorney General, the bill specifies the subjects to be addressed, including procedures for initiating, modifying, or terminating an undercover operation, and standards for determining when targets will be offered an opportunity to commit a crime. The guidelines must also establish an Undercover Operations Review Committee (UORC) for each agency, with representation from the FBI and from the Office of Legal Counsel of the Justice Department. All guidelines, or amendments thereto, must be submitted 30 days in advance of promulgation to the House and Senate Judiciary Committees.

Proposed Section 3805 would strengthen Congressional oversight of undercover operations by requiring a detailed annual report to the Judiciary Committees on all closed undercover operations, and on all operations which had been open for two years or more.

IV. PROHIBITED UNDERCOVER OPERATIONS

(See proposed 18 U.S.C. Sec. 3803)

This section of the Act would establish statutory standards for the initiation, maintenance, expansion, or renewal of an undercover operation. Such operations would be prohibited unless certain threshold requirements were satisfied. The section also specifies the level within the agency at which determinations of compliance with the threshold standards must be made. The purpose of both the substantive and the procedural provisions of this section is to prohibit undercover activities which unjustifiably intrude on privacy interests, privileged relationships, and areas of First Amendment concern.

The general threshold standard is one of reasonable suspicion of criminal activity. This standard, which is familiar to law enforcement officers, must be satisfied both for a general undercover operation targeted at a specific type of criminal activity, and for the phase of the operation in which an identified individual is to be given an opportunity to engage in a criminal act. Unless special circumstances are present, agency guidelines may provide that the determination as to whether this standard has been satisfied -- i.e., as to whether a reasonable suspicion exists -- may be entrusted to the head of the field office in charge (in FBI parlance, the Special Agent in Charge). In all other circumstances, or if the agency guidelines do not otherwise provide, the determination must be made by the agency's Undercover Operations Review Committee (UORC).

Two sorts of special circumstances require UORC involvement. The first case is the presence (or reasonable expectation) of any of the twelve special circumstances listed in proposed Section 3803 (b) (1) - (12). This list is drawn from the list of "sensitive circumstances" which, under the current FBI undercover guidelines, require headquarters involvement in decisions about undercover operations.

The second case not only requires that findings about satisfaction of threshold standards be made by the UORC, but also raises those standards to a higher level. Operations which will involve either the infiltration of a political, governmental, religious or news media organization, or the impersonation of an attorney, clergyman, physician, or reporter, may not be initiated or maintained unless there is probable cause to believe that the operation is necessary to detect or prevent specific criminal acts. This higher standard is justified because such operations may implicate important interests protected by the First Amendment, or by traditional evidentiary privileges. The determination of probable cause must be made by the UORC (rather than the field office) to bring greater objectivity and perspective to the decision.

Proposed Section 3803(c) authorizes agency guidelines to provide an exception to the usual threshold requirement determination procedure in the case of defined exigent circumstances. Under such an exception, the head of the field office could make the determination, even in a situation in which UORC approval would otherwise be required. An immediate written report to the UORC would have to follow any such emergency decision.

Proposed section 3803(d) requires findings to be made in writing and to state specific facts and cricumstances. Proposed section 3803(e) provides that the provisions on threshold requirements are not judicially enforceable.

To a great extent, the provisions of proposed Section 3803 simply codify principles already in operation in the FBI undercover guidelines. However, the Undercover Operations Act, besides applying these principles to all Justice Department agencies engaged in undercover work, would also make some substantive changes. For example, the use of undercover agents in preliminary inquiries when there is not even a reasonable suspicion of wrongdoing would be prohibited. The higher probable cause standard for undercover operations in areas with First Amendment implications, or where privileged relationships are intruded upon, is also a change from current practice.

In summary, proposed section 3803 strikes a balance between the needs of law enforcement and the protection of important privacy interests. The procedures which it establishes should be more expeditious and practical than the proposed judicial warrant requirement for some or all undercover operations.

V. COMPENSATION FOR INJURIES

(See proposed 18 U.S.C. Section 3804)

Injury to innocent citizens is an occasional, but inevitable, consequence of undercover operations. Sometimes an undercover agent or cooperating individual, in order to maintain his cover, will have to commit a criminal or fraudulent act. In other cases, an unscrupulous informant may capitalize on the scenario of an undercover operation to bilk innocent citizens. Sometimes legal injury will be caused by the very existence of an operation itself, as in the case of stolen property, recovered through a sting-operation fence, which cannot immediately be returned to its rightful owner. The ability of the injured party to recover from the government in these situations is currently doubtful, particularly when the injury results from the act of an informant rather than of a government agent, or when the discretionary function defense under the Federal Tort Claims Act is applicable.

The Undercover Operations Act would provide a remedy under the Federal Tort Claims Act for certain legal injuries inflicted in the course of an undercover operation. The provision covers injuries resulting from illegal acts committed by Federal employees or informants in the course of an undercover operation, or when enabled to commit such acts by participation in the operation. The bill also clarifies that an action will lie for injuries caused by negligent supervision of an undercover operation, but not for injuries flowing from operational or management decisions. The Federal Tort Claims Act procedures apply, except for the discretionary function defense and the exclusion of intentional torts.

VI. STATUTORY ENTRAPMENT DEFENSE

(See proposed 18 U.S.C. Sec. 16)

The statutory entrapment defense proposed in the Undercover Operations Act is designed to reform and clarify the law of entrapment, while seeking to deter the worst potential abuses of the undercover technique.

Proposed Section 16 establishes an affirmative defense of entrapment which may be established by showing to the court, by a preponderance of the evidence, that the defendant was induced to commit the offense by government action which more likely than not would have caused a normally law-abiding citizen to commit a similar offense. The inducement could have been made by a government agent directly, or by a private party (such as a cooperating individual) acting under the direction of or with the prior approval of law enforcement authorities. The proposal thus substitutes an objective test for the subjective "predisposition" test mandated by current, judge-made law.

The bill also specifies three circumstances in which the defense should be deemed to have been established. If the defendant can show that the government threatened harm to person or property, or coercively manipulated his economic or vocational situation, or provided him with goods and services which were otherwise unobtainable but required for commission of a crime, then he should be entitled to acquittal. While the occurrence of any of these overreaching tactics would in most cases violate the general entrapment standard stated in proposed section 16(a), each is sufficiently objectionable to justify a finding of entrapment per se.

EXCERPTS

97TH CONGRESS
2d Session

SENATE

REPORT NO.
97-682

FINAL REPORT

OF THE

SELECT COMMITTEE
TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEPARTMENT OF JUSTICE

TO THE

U.S. SENATE

DECEMBER 15 (legislative day, November 30), 1982—Ordered to be printed

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CHAPTER FOUR—SUMMARY OF RECOMMENDATIONS OF THE SELECT COMMITTEE

I. LEGISLATIVE RECOMMENDATIONS

A. Authorization and reporting requirements

The Congress, through its appropriate committees, should consider legislation that:

1. Expressly authorizes the FBI, DEA, and INS to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General;

2. Requires the Attorney General to issue, maintain, and enforce guidelines governing all undercover operations, and that requires the undercover guidelines to specify at least the following:

    (a) The procedures to be followed to initiate and to renew the authorization for an undercover operation;

    (b) The procedures to be followed to extend the time, increase the funds, or expand the geographic or subject-matter scope of an undercover operation;

    (c) The procedures to be followed to terminate an undercover operation;

    (d) The standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

    (e) The standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;

    (f) The functions, powers, composition, and voting procedures of an Undercover Operations Review Committee having at least six voting members, at least one of whom is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice;

3. Requires the Attorney General to submit in writing to the Senate Committee on the Judiciary and the House Committee on the Judiciary, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations, and every amendment to, or deletion or formal interpretation of, any such guideline;

4. Expressly authorizes the FBI, DEA, and INS, when reasonably necessary to the successful implementation of an authorized undercover operation:

    (a) To purchase or lease property, supplies, services, equipment, buildings or facilities, or to construct or to alter buildings or facilties, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States;

(b) To establish and to operate proprietaries;

(c) To use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary; provided, however, that the balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, must be deposited in the Treasury of the United States as miscellaneous receipts; provided, further, that proceeds from such a proprietary may not be used to offset any other expenses of the undercover operation, and that all proceeds recovered or generated other than by the proprietary must be deposited in the Treasury of the United States as miscellaneous receipts;

(d) To deposit, in banks or in other financial institutions, funds appropriated by Congress for undercover operations; and

(e) To engage the services of cooperative individuals or entities in aid of undercover operations, and, upon the prior written approval of the Attorney General or of the Deputy Attorney General, to execute agreements to reimburse those individuals or entities for their services and for losses incurred by them as a direct result of such operations;

5. Requires the Attorney General annually to submit to the Senate Committee on the Judiciary and to the House Committee on the Judiciary a written report on all undercover operations (A) that were terminated during the preceding calendar year or (B) that were terminated during any prior year and in which, during the calendar year preceding the report, the operations resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision, or (C) that were first approved by FBI HQ more than two years before the date of the annual report, with the annual report to contain at least the following information for each such operation:

(a) The date on which initiation of the operation was approved under the undercover guidelines;

(b) The identity of the ranking person who granted approval to initiate the operation;

(c) The number of special agents who worked as undercover agents in the operation during each year of the operation's existence;

(d) Each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(e) The identity of each ranking person who approved each extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation under the undercover guidelines;

(f) The date on which termination of the operation was approved under the undercover guidelines;

(g) The identity of the ranking person who approved the termination of the operation;

(h) The date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(i) The arrests made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

(j) The indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(k) The expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(l) A description of each jury verdict, sentence, judgment or dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

B. Entrapment

The Congress, through its appropriate committees, should consider legislation specifically creating an affirmative defense of entrapment, providing for the acquittal of a defendant when a federal law enforcement agent, or a private party acting under the direction of or with the prior approval of federal law enforcement authorities, is shown by a preponderance of the evidence to have induced the defendant to commit an offense, using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense. This legislation should establish entrapment per se when it is shown by a preponderance of the evidence that the defendant committed the crime:

1. Because of a threat of harm, to the person or property of any individual, made by a federal law enforcement agent or by a private party acting under the direction of or with the prior approval of federal law enforcement authorities;
2. Because federal law enforcement agents manipulated the defendant's personal, economic, or vocational situation to increase the likelihood of his committing that crime; or
3. Because federal law enforcement agents provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without government participation.

Threshold requirements for undercover operations

The Congress, through its appropriate committees, should consid- legislation providing that:

1. No component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except,

(a) When the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, upon a finding that there is reasonable suspicion, based upon articulable facts, that the individual has engaged, is engaging, or is likely to engage in criminal activity;

(b) When the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, upon a finding that there is reasonable suspicion, based on articulable facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type; provided that, if, during the course of the operation, agents of the Department of Justice wish to offer to a specific individual—who is identified in advance of the offer—an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion, based upon articulable facts, that the targeted individual has engaged, is engaging, or is likely to engage in criminal activity;

(c) When a government agent, informant, or cooperating individual will infiltrate any political, governmental, religious, or news media organization or entity, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

(d) When a government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person, upon a finding that there is probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality;

2. When certain specified sensitive circumstances (including those currently listed in Paragraph B of the Attorney General's Guidelines on FBI Undercover Operations) are present or are reasonably expected to materialize during the course of the undercover operation, the finding of reasonable suspicion required by subsection (1)(a) or (b) above shall be made by the Undercover Operations Review Committee following procedures to be specified in guidelines. When there is no expectation that the operation will involve such sensitive circumstances, that determination shall be made by the Special Agent in Charge or by the equivalent official in the field following procedures to be specified in guidelines. Findings of probable cause, as required by subsection (1)(c) or (d) above, shall be made by the Undercover Operations Review Committee, following procedures to be specified in guidelines;

3. When the initiation, expansion, extension, or renewal of an undercover operation is necessary to protect life or to pre-

vent other serious harm, and when exigent circumstances make it impossible, before the harm is likely to occur, to obtain the authorization that would otherwise be required, the Special Agent in Charge or the equivalent official in the field may approve the operation upon his finding that the applicable requirements of subsection (1) have been met. A written application for approval must then be forwarded to the Undercover Operations Review Committee at the earliest possible opportunity, and in any event within 48 hours after the initiation, expansion, extension or renewal of the operation. If the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation must be submitted to the Director and to the Attorney General;

4. A failure to comply with the provisions of this statute shall not provide a defense in any criminal prosecution or create any civil claim for relief.

D. Indemnification

The Congress, through its appropriate committees, should consider legislation to compensate from the United States Treasury persons (other than persons cooperating with or employed by the Department of Justice in connection with the undercover operation) injured in their person or property as a result of a Department of Justice undercover operation, under the following conditions and circumstances:

1. The injury was proximately caused by conduct, of a federal employee or of any other person acting at the direction of or with the prior acquiescence of federal law enforcement authorities, that violated a federal or state criminal statute, during the course of and in furtherance of a Department of Justice undercover operation;
2. The injury was proximately caused by conduct, of any federal employee or of any informant or other cooperating private individual, that violated a federal or state criminal statute and that the person who engaged in such conduct was enabled to commit by his participation in an undercover operation; or
3. The injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation; provided, however, that an action should not lie under this legislation for injury caused by operational or management decisions that relate to the conduct of the undercover operation.

II. RECOMMENDATIONS AS TO GUIDELINES

A. The Attorney General should amend the current Attorney General's Guidelines on FBI Undercover Operations as follows:

1. To make the guidelines generally applicable to all undercover operations of the Department of Justice, except that the guidelines should provide for the applicability or inapplicability of specific provisions to a specific component of the Department of Justice where that is made reasonably necessary by the peculiar nature or function of that component;

2. To prohibit government employees, informants, and cooperating private individuals from supplying to any suspect any item or service that the Undercover Operations Review Committee does not reasonably believe would be available to that suspect in the absence of the participation of the government employee, informant, or cooperating private individual;

3. To define with precision the terms "undercover employee," "public official," "cooperating private individual," and "cooperating person";

4. To define with greater clarity and precision the terms "investigation," "inquiry," and "routine investigative interviews," making clear the differences between the terms;

5. To require that a copy of every written application for and approval of an SAC-approved undercover operation be provided to and reviewed for informational purposes by the Undercover Operations Review Committee within 20 days of the SAC's approval.

B. The Attorney General should amend the Attorney General's Guidelines on FBI Use of Informants and Confidential Sources to clarify the definition of the term "informant" by expressly stating that the applicability of the term "informant" to a person does not depend in any way upon whether the person has been approved or disapproved as an informant, but instead depends solely on the nature of the person's activities.

III. RECOMMENDATION AS TO ADMINISTRATIVE DIRECTIVES

The Director of the FBI should issue orders, to be included in the Manual of Investigative Operations and Guidelines, requiring that the following procedures be followed in all undercover operations:

A. In every undercover operation requiring approval by FBI HQ, the special agent supervisor at FBI HQ assigned to the operation must send to each special agent in the field assigned to the operation, immediately upon that special agent's being assigned to the operation, the following material:

1. A memorandum, approved by the Office of the Legal Counsel of the Department of Justice and by the Legal Counsel of the FBI, summarizing the law of entrapment;

2. A memorandum, summarizing requirements imposed by statutes, rules, regulations, and policies of the Department of Justice with respect to electronic surveillance and to consensual monitoring of conversations;

3. The Attorney General's Guidelines on FBI Undercover Operations;

4. The Attorney General's Guidelines on FBI Use of Informants and Confidential Sources;

5. A memorandum, summarizing the requirements for

(a) Recording all telephone conversations on telephones at an FBI front;

(b) Recording, whenever it can be done without unreasonably jeopardizing human safety or the cover of the operation, all conversations between an undercover special agent and a suspect or between an informant and a suspect;

(c) Debriefing informants on a regular basis regarding unrecorded conversations between them and a suspects;

(d) Preparing FD 302 reports;

(e) Marking and numbering recording tapes given to informants for use in undercover operations;

(f) Maintaining an up-to-date log, of all audio tapes and video tapes, reflecting for each recording the time, date, place, parties, and general substance of each conversation;

(g) Preparing reports, contemporaneous with the receipt of any tangible item that might be relevant evidence at any subsequent criminal trial, describing the time, date, and manner in which the item was obtained, including the identity of the person from whom the item was received;

(h) Transcribing audio and video tapes and providing copies of the transcripts to the appropriate United States Attorney's office or Strike Force office and to FBI HQ;

(i) Filing with FBI HQ a monthly report describing, at least,

(*i*) New suspects and the principal evidence causing them to be suspects;

(*ii*) Any planned or actual expansion of the geographic scope of the operation;

(*iii*) Any planned or actual expansion of the subject-matter scope—that is, the types of crime being investigated or being discussed with possible suspects—of the operation;

(*iv*) Any significant change in the operation's cover or cover scenario;

(*v*) Any information whose possession by the Undercover Operations Review Committee, when that committee was considering any prior application to initiate, extend, renew, or expand the undercover operation, would reasonably have been more likely to have caused the Undercover Operations Review Committee to deny the application;

(*vi*) Any investigative technique newly used in the operation;

(*vii*) Actions taken to ensure coordination with the appropriate United States Attorney's office or Strike Force office;

(*viii*) Any significant problem or anticipated problem in the management or supervision of the investigation or in coordination with the appropriate United States Attorney's office or Strike Force office;

(*ix*) The past month's additions to the log of audio and video recordings.

B. In every undercover operation requiring approval by FBI HQ, the special agent supervisor at FBI HQ assigned to the operation must monitor the operation, ensure strict compliance with the reporting requirements described in Subparagraph A(5)(i) above, inquire about any apparent failure by special agents in the field to comply with the requirements described in Subparagraphs A(5)(a)–(h) above, report to his immediate superior any repeated failure to comply, and immediately provide to the Undercover Operations Review Committee any information received under Subparagraph A(5)(i)(*v*) above.

IV. RECOMMENDATION FOR ADMINISTRATIVE POLICY

The Select Committee recommends that in appropriate circumstances, when leaks to news media result in injury to a clearly innocent person, as occurred in Abscam with respect to Senator Larry Pressler, the Department of Justice should, at the request of that person, upon finding that a decision not to provide such a writing to other persons would not cause them undue harm, promptly inform him in writing that he is not suspected of any improper conduct.[1]

V. APPROPRIATIONS RECOMMENDATIONS

If, after considering the statistics and other facts described in this report, Congress finds it necessary and desirable for the FBI and other components of the Department of Justice to conduct at least as many undercover operations as those entities currently conduct, the appropriations for such operations should be increased sufficiently to enable undercover agents to have available at all times the basic equipment (primarily tape recorders and tapes) and staff support (transcribers, typists, and couriers, in particular) needed to enable them to satisfy the investigative, logistical, and procedural requirements that must be implemented and satisfied to reduce the risk that deficiencies such as those that characterized Abscam will not recur.

VI. CONCLUDING OBSERVATIONS

The Abscam undercover operation initially raised questions about the possibility that the executive branch could use its law enforcement powers to encroach upon the independence of the other branches of government and thereby to endanger the constitutionally mandated separation of powers. The Select Committee's investigation shows that no such encroachment occurred in Abscam, but events such as those described at pages 57, 62–63, 76 note 14 below demonstrate that the danger is no mere chimera. Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hands of less scrupulous administrators.

Nevertheless, the Select Committee has concluded that the proposals it has recommended to protect the civil liberties of all citizens will also adequately protect the separation of powers. The Select Committee finds this generally uniform approach far preferable to one, such as that proposed by Professor James Q. Wilson, that attempts to devise particular safeguards for the legislative branch. The uniform approach better ensures that the criminal laws can and will be used to protect the public against all forms of crime by all types of criminals, including those at the highest level of any of the three branches of government.

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[1] *See generally* Sel. Comm. Hrg., July 22, 1982, at 134–38.

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CHAPTER EIGHT—RECOMMENDATIONS FOR LEGISLATION

I. A RECOMMENDATION FOR LEGISLATION AUTHORIZING UNDERCOVER OPERATIONS AND EXEMPTING FBI, DEA, AND INS FROM RESTRICTIONS THAT UNDULY IMPEDE EFFECTIVE USE OF THE UNDERCOVER TECHNIQUE

The Congress, through its appropriate committees, should consider legislation that—

1. expressly authorizes the FBI, DEA, and INS to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General;

2. requires the Attorney General to issue, maintain, and enforce guidelines governing all undercover operations, and that requires the undercover guidelines to specify at least the following:

(a) the procedures to be followed to initiate and to renew the authorization for an undercover operation;

(b) the procedures to be followed to extend the time, increase the funds, or expand the geographic or subject-matter scope of an undercover operation;

(c) the procedures to be followed to terminate an undercover operation;

(d) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

(e) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;

(f) the functions, powers, composition, and voting procedures of an Undercover Operations Review Committee having at least six voting members, at least one of whom is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice;

3. requires the Attorney General to submit in writing to the Senate Committee on the Judiciary and the House Committee on the Judiciary, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations, and every amendment to, or deletion or formal interpretation of, any such guideline;

4. expressly authorizes the FBI, DEA, and INS, when reasonably necessary to the successful implementation of an authorized undercover operation,

(a) to purchase or lease property, supplies, services, equipment, buildings or facilities, or to construct or to alter

buildings or facilities, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States;

(b) to establish and to operate proprietaries;

(c) to use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary; provided, however, that the balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, must be deposited in the Treasury of the United States as miscellaneous receipts; provided, further, that proceeds from such a proprietary may not be used to offset any other expenses of the undercover operation, and that all proceeds recovered or generated other than by the proprietary must be deposited in the Treasury of the United States as miscellaneous receipts;

(d) to deposit, in banks or in other financial institutions, funds appropriated by Congress for undercover operations; and

(e) to engage the services of cooperative individuals or entities in aid of undercover operations, and upon the prior written approval of the Attorney General or of the Deputy Attorney General, to execute agreements to reimburse those individuals or entities for their services and for losses incurred by them as a direct result of such operations;

5. requires the Attorney General annually to submit to the Senate Committee on the Judiciary and to the House Committee on the Judiciary a written report on all undercover operations (A) that were terminated during the preceding calendar year, or (B) that were terminated during any prior year and in which, during the calendar year preceding the report, the operations resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision, or (C) that were first approved by FBI HQ more than two years before the date of the annual report, with the annual report to contain at least the following information for each such operation:

(a) the date on which initiation of the operation was approved under the undercover guidelines;

(b) the identity of the ranking person who granted approval to initiate the operation;

(c) the number of special agents who worked as undercover agents in the operation during each year of the operation's existence;

(d) each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(e) the identity of each ranking person who approved each extension of time, increase of funds, or expansion of geo-

graphic or subject-matter scope of the operation under the undercover guidelines;

(f) the date on which termination of the operation was approved under the undercover guidelines;

(g) the identity of the ranking person who approved the termination of the operation;

(h) the date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(i) the arrest made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested;

(j) the indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(k) the expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(l) a description of each jury verdict, sentence, judgment of dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

The Select Committee recommends that the Congress consider legislation that expressly authorizes the FBI, the Drug Enforcement Administration ("DEA"), and the Immigration and Naturalization Service ("INS") to conduct undercover operations pursuant to guidelines established and maintained by the Attorney General. This legislation should exempt the FBI, DEA, and INS from several legal restrictions that generally apply to agencies of the government and that could, if strictly enforced, unduly impede effective use of the undercover technique. In order to enable the Congress to exercise its oversight responsibilities, however, such authorizing legislation should be accompanied by legislation requiring that the Attorney General annually submit to the House and Senate Judiciary Committees a written report on terminated undercover operations and long-running undercover operations.

A. Statutory Authority For Undercover Operations

The Select Committee concludes that the law enforcement components of the Department of Justice that conduct undercover operations to detect federal criminal violations should have express statutory authority to do so. Authority for undercover operations may be implicit in the Attorney General's statutory mandate to appoint officials to detect and prosecute federal crimes (28 U.S.C. § 533 (1976)); but it is unseemly that the arm of government bearing primary responsibility for enforcing the nation's laws should have to rely on strained interpretations of various statutes in order to employ a crucial law enforcement technique.

In order to establish, to furnish, and to maintain secure cover for FBI personnel or informants, for example, it is necessary to make false representations to third parties and otherwise to use techniques of deception to conceal government involvement in the operation. Passports, drivers' licenses, other personal identification papers, and a vast range of other documentation must be forged to build effective cover. State laws frequently must be disregarded, and federal laws must be construed very loosely to permit these practices that are integral to the conduct of undercover operations. Although the Attorney General has authorized the use of undercover operations and funds have been appropriated for such operations by Congress, such operations lack the legitimacy that comes from clear and direct legislative authorization. Indeed, if attacked by an appropriate party in a judicial proceeding, such operations might be found to be unauthorized.

The FBI and other components of the Department of Justice should have the explicit endorsement of Congress if they are to continue their extensive and growing use of undercover operations. At the same time, however, the Select Committee concludes that this authority should not be granted independently of the standards and guidelines requirements needed to establish a complete framework of legislative policy and accountability for undercover operations. Congress has provided almost no policy guidance to the FBI or to the Department of Justice in this area. The courts examine undercover operations solely in the context of, and from the point of view of, the rights of criminal defendants in particular cases. The judiciary, therefore, is unable to address any significant aspects of the use of undercover techniques, because questions of proper management and control frequently lie outside the courts' purview. For example, the privacy and reputation of individuals who are never prosecuted can be adversely affected by an undercover operation, and they may have no recourse in the courts. Only the Congress can make a comprehensive, independent assessment of all dimensions of the use of undercover techniques by federal law enforcement agencies.

B. Attorney General's Guidelines

Since 1975 four Attorneys General under three Administrations have undertaken to develop and to maintain guidelines for the FBI and for other investigative agencies in the Department of Justice. FBI Director William H. Webster and his predecessor, Clarence M. Kelly, have welcomed such guidance and have worked closely with each Attorney General to ensure that the guidelines are workable and responsive to concerns for privacy and accountability. While some revisions in current FBI guidelines are desirable, the Select Committee commends the responsible officials who have maintained this commitment to the articulation of standards for the exercise of the vast discretionary powers of federal law enforcement agencies. That commitment should not, however, depend entirely on the policy inclinations of the particular individuals who may be appointed in future years to high positions in the Department of Justice.

The Select Committe recommends that legislation authorizing undercover operations by components of the Department of Justice should require the Attorney General to issue, to maintain, and to enforce guidelines governing all such operations. Those undercover guidelines should be required to specify:

(1) the procedures to be followed to initiate and to renew the authorization for an undercover operation;

(2) the procedures to be followed to extend the time, to increase the funds, or to expand the geographic or subject-matter scope of an undercover operation;

(3) the procedures to be followed to terminate an undercover operation;

(4) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover operation should be initiated, extended, renewed, expanded, given increased funds, or terminated;

(5) the standards to be employed, consistent with all applicable statutory requirements, in determining whether an undercover agent may offer or cause to be offered to another person an opportunity to commit a crime;

(6) the functions, powers, composition, and voting procedures of an Undercover Review Committee having at least six voting members, at least one of whom (in the case of FBI operations) is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice.

The statutory requirement for Attorney General's guidelines would ensure that the standards and procedures for undercover operations continue to be the product of careful deliberation. Except for the most basic and essential threshold standards, discussed at pages 377–89 *infra*, the guidelines themselves need not now be legislated. Because statutory guidelines might inhibit needed administrative flexibility, legislation with respect to guidelines should, unless and until law enforcement agencies are shown to be unwilling or unable to formulate and administer adequate guidelines, focus on those aspects of undercover operations that demand the imprimatur of the Congress to sustain their legitimacy.

C. Notice of Changes in Guidelines

The Attorney General should be required to submit in writing to the House and Senate Judiciary Committees, at least 30 days before it is promulgated, every guideline governing undercover operations, informants, or criminal investigations and every amendment to, deletion from, or formal interpretation of, any such guideline.

This prior notification of Congress concerning FBI guidelines had been the general practice since such guidelines first were developed in 1976. The Select Committee recommends that such notice be required by statute and extended to all formal interpretations of the guidelines. The addition of formal interpretations is especially important in view of the Select Committee's discovery that the term "public official" in the FBI Undercover Operations Guidelines had been formally construed by the FBI to exclude many classes of government officials appointed or elected to high offices, that several other words and phrases in the guidelines had been given "interpretations" plainly inconsistent with their ordinary meanings, and that none of those "interpretations" had been submitted to the Judiciary Committees.

D. Exemptions from Restrictive Laws

In his testimony before the Select Committee, Director Webster urged passage of legislation exempting FBI undercover operations from certain laws that inhibit or foreclose the use of certain undercover techniques. He stated that "undercover operations pose unique problems that must be addressed by specific legislation," and he recommended that detailed undercover authority "be enacted into permanent law." He stated that the Department of Justice would be submitting appropriate legislation for consideration by the 98th Congress. Describing previous congressional consideration of this matter, Director Webster testified:

> As early as 1978, the FBI was authorized by the Department of Justice Appropriations Authorization Act, Fiscal Year 1979, to use appropriated funds to enter into leases, deposit appropriated funds and income from undercover operations in banks or other financial institutions, and use proceeds generated by undercover operations to offset necessary and reasonable expenses of the operations. In every succeeding year up to February 1, 1982, Congress has, by Authorization Act or continuing resolution, extended these authorities.
>
> Unfortunately, there have been lapses in the authorization process and consequently in our undercover authorities. The most serious of these has extended from February 1, 1982, to the present.
>
> It is clear that, while convenient, yearly authorization bills are not the appropriate vehicle for these undercover authorities. Too much is at stake. (Sel. Comm. Hrg., Sept. 30, 1982, at 19–20 (testimony of William H. Webster).)

The Select Committee agrees with the Director's points, as long as the permanent authority he seeks is coupled with the legislative standards discussed in the following sections.

The "unique problems" described by Director Webster as being posed by undercover operations were first called to the attention of Congress in 1978, when the Department of Justice submitted a proposed amendment to the authorization bill then pending. In a letter to the Senate Judiciary Committee, Acting Attorney General Benjamin R. Civiletti stated that, in the course of studying the legality of FBI undercover operations, the Department of Justice had "discovered several legal problems, arising out of the requirements relating to government procurement or the handling of public funds, which present substantial obstacles to the continued effective performance of undercover operations." He added that, unless corrective legislation were enacted, these legal problems would "require that current and proposed major operations be terminated, be substantially reduced in scope, or adopt practices which significantly reduce their effectiveness." The Acting Attorney General attached a memorandum from John M. Harmon, Assistant Attorney General for the Office of Legal Counsel, discussing the legal problems in greater detail.[1] The Select Committee has relied primarily on the Office of Legal Counsel memorandum and related materials for its understanding of the legal problems. FBI officials also provided information on the practical effects of these legal problems on the design and implementation of various types of undercover operations. The Select Committee finds that the concerns that justified legislative action on these matters in 1978 remain valid today.

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[1] FBI Statutory Charter: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 248–65 (1978).

1. Procurement, leasing, and contracting

When reasonably necessary to the successful implementation of an authorized undercover operation, the FBI and other components of the Department of Justice should have the authority to purchase or to lease property, supplies, services, equipment, buildings or facilities, or to construct or to alter buildings or facilities, or to contract for construction or alteration of buildings or facilities, in any State or in the District of Columbia, without regard to statutes, rules, and regulations specifically governing contracts, contract clauses, contract procedures, purchases, leases, construction, or alterations undertaken in the name of the United States.

At least four problems arise under existing statutes relating to government contracting, leasing, and procurement. First, 31 U.S.C. § 665(a) and 41 U.S.C. § 11(a) prohibit federal agencies from entering into contractual obligations, unless appropriations are available to meet those obligations or unless they are authorized to do so by law. In the leasing area these statutes have been interpreted to prohibit leases that extend beyond the current fiscal year, unless such contracts are authorized by law or unless appropriations are available to meet those obligations. While the Office of Legal Counsel did not decide definitely in 1978 that these statutes prohibit multi-year leases for law enforcement undercover operations, it considered the question to be a very close one. In order to avoid the risk of illegality, the FBI must structure the operation in a manner that permits it to enter into month-to-month leases, enter into leases extending only to the end of the fiscal year, or look for other locations. These options may be unavailable for larger operations, because the lessors of large commercial property tend to require leases in excess of one year.[2]

A second problem results from 40 U.S.C. § 34, which prohibits leasing in Washington, D.C., without an appropriation for the lease's having "been made in terms by Congress." Another prohibition on rentals in Washington, D.C., is contained in 40 U.S.C. § 35. While the Office of Legal Counsel did not reach a conclusion in 1978, it suggested that the legal problems might require the FBI to conduct its operations in Washington, D.C., from space leased either in Maryland or in Virginia, thus raising credibility problems and practical difficulties that might render an operation altogether inadvisable.

Third, statutes such as 41 U.S.C. §§ 22, 254(a) and 254(c) require specified clauses to be inserted into government contracts. These clauses relate to prohibitions on contracts with members of Congress, payment of improper fees in soliciting or securing government contracts, and the Comptroller General's access to the contractor's or subcontractor's records. It is obvious that the inclusion of such clauses would disclose that a government agency was involved and would compromise an undercover operation requiring concealment of government affiliation. The Office of Legal Counsel concluded in 1978 that the FBI may enter into leases without including in the leases clauses usually required in government contracts. This determination was based on assurances from the FBI that it could operate satisfactorily under certain conditions necessary to ensure the legality of the contracts. The Office of Legal Counsel recommended that a specific legislative exemption be enacted because of "the broad language" of the pertinent statutory provisions.

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[2] If a lessor requires advance payments, similar problems arise under 31 U.S.C. § 529 (1976) and 41 U.S.C. § 255 (1976).

The FBI also needs specific authority to purchase real property, because in cases involving undercover surveillance, there may be no choice as to the location. Two existing statutes may prevent the FBI from acquiring the necessary property: 40 U.S.C. § 255 requires a written opinion from the Attorney General that real property is purchased with clear title; and 40 U.S.C. § 606 requires that any acquisition of a public building valued over $500,000 be approved by resolution of the House and Senate Public Works Committees. Although such purchases have been made in the past based on opinions from the Department of Justice, statutory authority would confirm the legitimacy of these purchases.

While the problems with procurement, leasing, and contracting may not be as serious as those discussed below relating to proprietaries and bank deposits, they still unnecessarily inhibit undercover operations. Long-term leasing is a requirement for almost every significant FBI operation, and such leases frequently are needed for vehicles and other equipment, as well as for space. The FBI does not draw upon the vehicles and other equipment allocated for regular criminal investigations to supply the needs of an undercover enterprise. In the legislation that expired on February 1, 1982, the FBI could exercise its special leasing authority only upon the personal certification of the FBI Director and of the Attorney General or Deputy Attorney General that such authority was "necessary for the conduct of" an undercover operation. Despite the expiration of this statutory requirement, the Director and Deputy Attorney General continue to make these certifications as if the law were still on the books. The Select Committee does not believe such high-level approval requirements, triggered by a narrow technical legal issue, need to be included in permanent legislation that requires guidelines and standards for all undercover operations.

As discussed below, one of those requirements would be an annual report on closed operations. That report should cover the expenses, other than for salaries for employees of the United States, incurred in the operation in each calendar year preceding the report. When operations continue for longer than two years, a comparable report should also be made. These reports would provide an accounting for the expenditures on long-term leases or contracts, as well as for the purchase of property and services. The statute that expired on February 1, 1982, contained a comparable audit requirement for closed operations; and the FBI has continued to conduct such audits, despite the expiration of the statutory requirement.

It is to the credit of the FBI and the Department of Justice that the Congress was informed of these issues early in the development of more complex undercover FBI efforts and that clarifying legislation was requested to ensure the legality of FBI operations. With the termination of the special authorities, the FBI and the Department have been forced to choose between curtailing operations and relying on statutory interpretations in which the Office of Legal Counsel did not have complete confidence in 1978. If Congress expects the FBI to adhere strictly to applicable laws, reasonable steps should be taken to avoid placing the FBI in such a dilemma.

2. Proprietaries

The authority to establish and operate proprietaries is another example of this dilemma. Congress should provide such authority, even though the FBI and the Office of Legal Counsel in the Department of Justice believe they can circumvent current statutory requirements. Title 31, section 869(a) of the United States Code provides:

> No corporation shall be created, organized, or acquired on or after December 6, 1945, by an officer or agency of the Federal Government or by any Government corporation for the purposes of acting as an agency or instrumentality of the United States, except by an Act of Congress or pursuant to an Act of Congress specifically authorizing such action.

In a letter to the House Select Committee on Intelligence, dated January 23, 1976, the Department of Justice explained its conclusion that this statute does not apply to undercover proprietary corporations. In the Department's opinion, the statute was directed at the practice of incorporating agencies, exemplified by the Reconstruction Finance Corporation, overtly engaged in government functions. By contrast, the corporate purpose of an undercover proprietary is not to perform a government function, but to carry out commercial activities or to appear to be doing so. Thus, such corporations are not established "for the purpose of acting as an agency or instrumentality of the United States" within the meaning of the statute. Instead, their purpose is to avoid acting openly as a government agency.[3]

In 1979, at the request of the Senate Judiciary Committee, the American Law Division of the Congressional Research Service, Library of Congress, researched the issue and came to a different conclusion. Its opinion noted that the language of the statute "leaves little room for exception to its requirement;" and it advised that Congress "has, albeit without FBI law enforcement techniques in mind, outlawed such incorporation." [4] Consequently, while the explicit authority to establish proprietaries had not originally been requested by the Department of Justice in 1978, it was sought by Director Webster in 1979.[5] Congress included in the Justice Department Authorization Act for Fiscal Year 1980 the authority to establish or to acquire proprietary corporations or business entities as part of an undercover operation and to operate such corporations or business entities on a commerical basis, without regard to 31 U.S.C. § 869. There also was a requirement that, whenever such a proprietary with a net value over $50,000 was to be liquidated, sold, or otherwise disposed of, the FBI report the circumstances to the Attorney General and to the Comptroller General and deposit the proceeds (after obligations were met) in the Treasury of the United States. This provision, too, has lapsed.

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[3] Office of Legal Counsel, Dept. of Justice, Explicit Authority for the FBI to Create Proprietaries (Apr. 13, 1979).

[4] K. Ronhovde, Congressional Research Service, The Library of Congress, The Authority of the Federal Bureau of Investigation to Incorporate an Enterprise in the Course of Conducting an Investigation (Mar. 16, 1979).

The Select Committee recommends permanent statutory authorization for the establishment of proprietaries by the FBI and, if requested by the Attorney General, by DEA and by INS. The requirements regarding disposition of proprietaries are covered by the recommendations on the use of income to offset expenses and annual reports to the Congress, discussed at pages 356–58 and 360–61 *infra*.

3. Use of income to offset expenses

The most important legal and practical problem that now exists because of the lapse of the special authority on February 1, 1982, concerns the disposition of moneys received in the course of FBI undercover activities. In 1978 the Office of Legal Counsel reached the conclusion that 31 U.S.C. § 484 requires that such moneys be paid into the Treasury. As the Office of Legal Counsel stated, this legal requirement has "a severe impact on both the scope and the credibility of FBI undercover operations." Expiration of the FBI's special authority has required the FBI to cease the practice of using the income from an undercover operation to offset its expenses. As a result, all the expenses of operations that involve the use of undercover businesses must be met out of FBI appropriations and cannot be defrayed by using the income generated by the particular business. Given the limited funds available, these operations necessarily had to be reduced in number or in scope.

The FBI appears to have no alternative. The option of increasing the FBI's budget is not within the FBI's control and is subject to the fiscal constraints that affect almost all domestic programs. Another alternative that has been used on occasion is for the FBI to associate with a private business. This option is not available, however, when the owners of businesses that would be useful to the FBI's investigations are unwilling to cooperate with the FBI. The FBI itself has been reluctant to adopt this approach, because of the problems of civil liability or dangers that might be created for the well-being of private individuals.

A second way in which the FBI uses income to offset expenses is in the gambling area. Agents involved in undercover activities frequently associate with persons who engage in various forms of gambling; the agent must also gamble if he is to maintain his credibility. It should be obvious that, even when fairly low sums of money are involved, the undercover agent's task is very complicated if the receipts from each winning hand or roll of the dice must go into the Treasury. Gambling also involves "averaging," and a gambler who cannot offset winnings against losses in a night of poker or a day at the racetrack would have inordinate expenses. Other problems might occur if the individual agent must later render an accounting of all of the various gambling transactions which took place. According to the FBI, the application of 31 U.S.C. § 484 to FBI operations requires its undercover agents generally to avoid gambling, with the consequent loss to those agents' credibility and access to criminal elements.

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[5] *See* Letter from FBI Director William H. Webster to Representative Don Edwards (Apr. 27, 1979).

Since February 1, 1982, the FBI has been forced to cut back on ongoing operations because of the termination of the authority to use income to offset expenses. Operations like Bancoshares, which involved the laundering of large amounts of money acquired by narcotics traffickers, are impossible. When operations have continued, the legal problems have been an inhibiting factor on proposed scenarios. Even under the special authority that expired on February 1, 1982, there were problems because of the absence of permanent legislation and the consequent inability to make financial commitments. The ability to use income to offset the expenses of an operation can make certain kinds of undercover operations cost free. In some cases the FBI has been able to reuse the same money four or five times. The FBI has the resources and the expertise to develop operations that can combat crimes involving the movement of large amounts of money. Without the authority to use income to offset expenses, however, such operations are prohibitively expensive.

The legislation recommended by the Select Committee would alleviate this problem by allowing the FBI to use proceeds generated by a proprietary established in connection with an undercover operation to offset necessary and reasonable expenses of that proprietary. The balance of such proceeds, and proceeds derived from the sale of the proprietary or of its assets, would have to be deposited in the Treasury of the United States as miscellaneous receipts. Furthermore, the proceeds from such a proprietary should not be used to offset any other expenses of the undercover operation; and all proceeds recovered or generated other than by the proprietary would have to be deposited in the Treasury of the United States as miscellaneous receipts. This recommendation differs from the special authority that expired on February 1, 1982, which permitted use of the proceeds from an undercover operation to offset necessary and reasonable expenses incurred in that operation.

The Select Committee's recommendation is based on its finding that an undercover operation may be so extensive and may change direction so significantly that the authority for self-sustaining operations should not be unlimited. Small-scale FBI operations, involving no more than two or three undercover agents engaged in a variety of separate, interrelated enterprises, may suffer under this limitation. The Select Committee expects, however, that the term "proprietary" will be construed with reasonable flexibility for unincorporated enterprises. The initial and ever-widening breadth of Abscam and Goldcon sharply demonstrate that this limitation is vitally necessary.

In the current period of fiscal stringency, the savings likely to result from this legislation are especially important for the conduct of proper and effective FBI undercover operations. The failure of the Congress to renew the special authority that temporarily resolved this problem before February 1, 1982, was the equivalent of a substantial reduction in the funds available for FBI undercover operations. The Select Committee has found that scarce resources not only limit the effectiveness of FBI operations against crime, but also make it far more difficult for FBI agents in the field to comply adequately with strict recordkeeping and management requirements that protect the rights of individuals and ensure accountability for the conduct of operations. Unless Congress is willing to appropriate funds to make up the difference, inaction on this issue has the effect of telling the FBI that Congress does not support undercover operations. The Select Committee believes that such inaction is neither justified by the record nor representative of the views of the majority of the Congress.

4. Bank deposits

In the course of an undercover operation, it sometimes becomes necessary for the FBI to deposit public funds in a bank. This may happen in several different situations. First, funds may be deposited to maintain and support undercover agents or off-site surveillance teams or equipment so that these entities will not be identified with the FBI. Second, businesses established by the FBI must deposit funds in banks in order to operate as any commercial enterprise would. Finally, in white-collar crimes and organized crime investigations, frequently individuals with whom the FBI is dealing require FBI undercover agents to demonstrate their financial ability to participate in transactions involving large amounts of cash, such as in cases involving the purchase of stolen securities. To do this the FBI must deposit large sums in banks to permit the undercover agent to verify his financial resources.

Although these practices appear to violate the plain language of 18 U.S.C. § 648 and 31 U.S.C. § 521, the Office of Legal Counsel of the Department of Justice concluded in 1978 that the FBI might deposit funds in banks under certain circumstances without violating the statutes. The rationale that justified this conclusion did not, however, extend to certain large deposits needed to conduct successfully particular types of white collar and organized crime investigations. The legality of the FBI's practice of depositing public funds in banks depended on whether the FBI could ensure that the funds were fully safeguarded. In certain cases where the FBI needs to display large financial resources, however, the limitations necessary to comply with the statutes would frustrate the undercover operation. Even the limited operations that can be conducted consistent with the statutes may be short-lived, because sophisticated criminals may be able to identify them as FBI tactics.

The goals underlying the bank deposits statutes—guarding against favoritism among banks, ensuring that the government has funds available when needed, and preventing overexpansion of bank notes—do not seem threatened by the FBI's practice. The statute's major objective—safeguarding public funds—need not be pursued so rigorously as to prevent the FBI from undertaking the types of undercover operations needed to combat more sophisticated criminal enterprises.

5. Indemnification of cooperating parties

In his testimony before the Select Committee, Director Webster stressed the need to enact legislation giving the FBI authority to enter into agreements to indemnify cooperating parties:

> Participation in undercover operations by persons engaged in various professions and business pursuits is vital to the success of FBI undercover operations. The cooperation extended by legitimate businesses has assured our agents the necessary cover and credibility in carrying out their undercover mission. For example, various banks have provided wire transfer service of large sums of money in narcotics investigations, such as Bancoshares. Airlines, investment corporations, oil companies, and other responsible business entities have made it possible to successfully investigate and prosecute complicated economic crimes, public corruption, and labor racketeering cases that would otherwise be unapproachable due to the necessity of being an "insider" to illegal activity.
>
> In return for the services provided to the FBI by these legitimate concerns, an indemnification agreement is often sought by the cooperating party. They seek assurances that the FBI or the Department of Justice will defend all actions for damages arising out of acts of agents of the FBI or activities initiated by the cooperative party in furtherance of the undercover operation.
>
> Cooperative parties presently assume economic and professional risks on behalf of the government, and, in return, the FBI can only offer them one-sided personal service agreements. These agreements generally minimize the obligations and liability of the government but provide little protection to the individual. Potential civil liability often influences a decision to assist the government. (Sel. Comm. Hrg., Sept. 30, 1982, at 20–21 (testimony of William H. Webster).)

Director Webster added that the Department of Justice is considering the possibility of legislation to address this problem. The Select Committee recommends that such legislation be included in the permanent statutory authorization for FBI undercover operations.

Historically, certain general principles have applied to indemnification agreements by the government: obligations that have been indefinite, uncertain, and of limited nature have consistently been regarded as objectionable, in the absence of express statutory authority to the contrary.[6] Additionally, an agreement, entered into by an authorized government official, making the government liable for damages in an indefinite and unlimited amount is null and void.[7] Following these general principles that the government should not oblige itself to write a "blank check" for an unspecified amount when entering such agreements, legislation authorizing the FBI to enter into indemnification agreements should require the specific approval of each agreement by the Attorney General or by the Deputy Attorney General. Consideration might also be given to adding a statutory ceiling on the amount of liability assumed by the government per agreement and per fiscal year.

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[6] 7 Comp. Gen. 507 (1928); 8 Comp. Gen. 647, 648 (1929); 35 Comp. Gen. 85, 87 (1955).

[7] *Id.*

The need for this indemnification authority is clearly supported by the unfortunate experience of a cooperating party in one of the FBI undercover operations examined by the Select Committee. In the undercover operation known as Frontload an insurance company that provided the FBI with essential assistance suffered serious financial losses as a result of fraud perpetrated by the individual whom the FBI initially used as its principal informant. While special arrangements could be made in that case to compensate the firm, the experience illustrates the risks that cooperating businesses may face if they accede to the FBI's request for assistance. The Select Committee believes that private citizens and business firms who decide to cooperate with the FBI in the conduct of an undercover operation should not be forced to confront possible dangers without the firm prospect of help from the government if those dangers materialize.

E. Annual Reports To Congress

The rapid expansion of FBI undercover operations represents a dramatic shift in FBI practices and priorities. This shift was well underway before the Abscam prosecutions led both Houses of Congress to study in depth the growth of FBI undercover operations. The FBI has now fully incorporated undercover operations into its arsenal of crime-fighting techniques, and the DEA and the INS plan to expand their use of more complex undercover techniques. These developments make it especially necessary for Congress to exercise its oversight function vigorously so that this powerful law enforcement weapon does not lose its legitimacy through carelessness or abuse. In his testimony before the Congress in the past several years, Director Webster consistently has recognized the importance of this oversight function.

The Select Committee recommends the establishment of permanent oversight arrangements through a statutory requirement that the Attorney General annually submit to the House and Senate Committees on the Judiciary a written report on all undercover operations closed during the preceding calendar year. The report also should cover operations that have continued for longer than two years and operations that were terminated during any prior year and in which, during the calendar year preceding the report, the operation resulted in an arrest, an indictment, a jury verdict, a sentence, a judgment of dismissal, a judgment of acquittal, or an appellate court decision. The report should contain at least the following information for each operation:

(1) The date on which initiation of the operation was approved under the undercover guidelines;

(2) The identity of the ranking person who granted approval to initiate the operation;

(3) The number of special agents (or comparable employees of other Justice Department components) who worked as undercover agents in the operation during each year of the operation's existence;

(4) Each date on which an extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation was approved under the undercover guidelines;

(5) The identity of each ranking person who approved each extension of time, increase of funds, or expansion of geographic or subject-matter scope of the operation under the undercover guidelines;

(6) The date on which termination of the operation was approved under the undercover guidelines;

(7) The identity of the ranking person who approved the termination of the operation;

(8) The date on which the operation terminated and the manner in which termination was effected, including the manner in which the operation was made known to the news media;

(9) The arrests made in the operation during each year of the operation, including the identity of each person arrested and each crime for which he was arrested:

(10) The indictments issued as a result of the operation during each year of the operation, including the identity of each person indicted and each crime for which he was indicted;

(11) The expenses incurred, other than for salaries for employees of the United States Government, in the operation in each calendar year preceding the report;

(12) A description of each jury verdict, sentence, judgment of dismissal, judgment of conviction, and appellate court decision rendered or imposed as a result of the operation.

The legislation that expired February 1, 1978, contained a requirement that the FBI conduct detailed financial audits of closed undercover operations and report annually to the Congress concerning these audits. The Select Committee's recommendation would expand this annual reporting requirement to cover the overall duration of the operation, the officials responsible for its initiation and termination, and the results achieved by the operation. The recommendation that the report include operations that have continued for longer than two years should not impose an undue burden, because the FBI already audits ongoing operations every 18 months, as well as upon closing. Most FBI operations are terminated after six months or a year.

The Select Committee finds this requirement to report on long-running operations is necessary to ensure accountability. In at least one instance, an FBI operation has gone on for seven years, and this suggests the importance of reporting more than just closed operations. Of course, arrangements would be required to protect the confidentiality of information on such active operations. The Select Committee urges the Judiciary Committees to carry forward the bipartisan mandate for oversight of undercover operations that the Senate gave the Select Committee in Senate Resolution 350.

II. A RECOMMENDATION FOR ENTRAPMENT LEGISLATION

The Congress, through its appropriate committees, should consider legislation specifically creating an affirmative defense of entrapment, providing for the acquittal of a defendant when a federal law enforcement agent, or a private party acting under the direction of or with the prior approval of federal law enforcement authorities, is shown by a preponderance of the evidence to have induced the defendant to commit an offense, using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense. This legislation should establish entrapment per se when it is shown by a preponderance of the evidence that the defendant committed the crime—

1. *because of a threat of harm, to the person or property of any individual, made by a federal law enforcement agent or by a private party acting under the direction of or with the prior approval of federal law enforcement authorities;*
2. *because federal law enforcement agents manipulated the defendant's personal, economic, or vocational situation to increase the likelihood of his committing that crime; or*
3. *because federal law enforcement agents provided goods or services that were necessary to the commission of the crime and that the defendant could not have obtained without government participation.*

While the various sets of guidelines issued by the Attorney General administratively limit the activities of some federal law enforcement officials, the only judicially enforceable constraints on federal undercover operations are the court-created doctrine of entrapment and the constitutional requirement of due process of law. Undercover operations in which FBI operatives both disguise their true identities and offer to private parties inducements to commit crimes are almost always attended by potential problems arising under those two doctrines. As the number of such operations has increased, therefore, it has become particularly important that the entrapment and due process constraints function effectively. The Select Committee finds, however, that the current entrapment doctrine fails to meet that requirement; that nearly unanimous disapproval by legal scholars of the current entrapment doctrine is sound; that due process principles do not adequately make up for the deficiencies of the entrapment doctrine; and that Congress should accept the Supreme Court's invitation to legislate in this area.[8]

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[8] See *United States* v. *Russell*, 411 U.S. 423, 433 (1973), in which the Court stated, "Since the defense [of entrapment] is not of a constitutional dimension, Congress may address itself to the question and adopt any substantive definition of the defense that it may find desirable." Codification and modification of the entrapment doctrine was first proposed in 1971 by the U.S. National Commission on the Reform of Federal Criminal Laws ("National Commission"). The original version of the proposed revised criminal code, which was inspired in part by the National Commission proposals, suggested codification of the entrapment doctrine in its present form, disregarding the National Commission's proposed modifications. (S. 1, 94th Cong., 1st Sess. § 551 (1975).) The most recent version of the revised criminal code, however, has followed neither of those courses, dealing generally with defenses by declaring simply that "the existence of a defense or affirmative defense to a prosecution under any federal statute, including a defense . . . [of] unlawful entrapment . . . shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience." (S. 1630, 97th Cong., 2d Sess. § 501 (1981).) In choosing to retain the

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A. Existing Law

1. Entrapment

The entrapment defense has changed little since the Supreme Court created it in 1932. It is not a constitutionally based doctrine; rather, it is a limitation that the Court, based on its belief that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations" (*Sherman* v. *United States,* 356 U.S. 369, 372 (1958)), has found to be implicit in every federal criminal statute. In brief, the Court has determined that, if he was induced to commit his crime by a government agent, a defendant may not be convicted of having violated a federal criminal statute unless he was previously disposed to engage in similar criminal activity. If the accused produces evidence demonstrating that the undercover agent induced him to commit the charged offense, the government must establish beyond a reasonable doubt that the defendant was predisposed towards criminal conduct. To meet this burden the prosecution may introduce evidence relating to the defendant's character, reputation, prior bad acts, and prior convictions. (*Osborn* v. *United States,* 385 U.S. 323, 332 n. 11 (1966).) Whether the defendant was predisposed is a question of fact to be resolved by the jury. (*Sherman* v. *United States,* 356 U.S. at 377 n. 8.)

Thus, the entrapment doctrine in its present form purports to focus largely on the defendant's state of mind. As Chief Justice Hughes declared for the Supreme Court when creating the doctrine, "[T]he controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." (*Sorrells* v. *United States,* 287 U.S. 435, 451 (1932).) In other words, the Court has attempted to articulate an entrapment defense that will draw a line between "the unwary innocent," who may not be convicted when lured into criminal activity by a federal agent, and the "unwary criminal," who has no defense under such circumstances. (*Sherman* v. *United States,* 356 U.S. at 372.) The Court recently reaffirmed this formulation of the doctrine in *United States* v. *Russell,* 411 U.S. 423 (1973), and in *Hampton* v. *United States,* 425 U.S. 484 (1976).

In a series of concurring and dissenting opinions, however, several of the Justices have disputed the majority's entrapment analysis. These Justices have challenged the fiction underlying the majority's opinions: that Congress tacitly intended the Court-articulated entrapment defense to be implicit in every federal criminal statute. Instead, they would bar prosecution of certain "induced" offenses as an exercise of the Supreme Court's supervisory power.

More fundamentally, these Justices have rejected the majority's focus on the individual defendant's state of mind, arguing that "a person's alleged 'predisposition' to crime should not expose him to government participation in the criminal transaction that would be

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court-created approach to entrapment, the Committee on the Judiciary observed that it, "like the National Commission and virtually every other principal criminal code reform body in modern times, believes that the legislative codification of general defenses and bars to prosecution may be desirable in the future." (S. Rep. No. 97-307, 97th Cong., 2d Sess. 91 (1981).)

otherwise unlawful." (*United States* v. *Russell,* 411 U.S. at 444 (Stewart, J., dissenting).) The minority Justices have advocated an objective test for entrapment, which would "shif[t] attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime." (*Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J., concurring in the result).) This position has been endorsed by the vast majority of legal commentators,[9] by the American Law Institute,[10] and by the U.S. National Commission on Reform of Federal Criminal Laws ("National Commission").[11]

The persistence of criticism aimed at the Supreme Court majority's approach is understandable. The Court's reliance on implied Congressional intent does rest upon an obvious fiction,[12] since Congress has never expressed any intention to create such a doctrine. More fundamentally, the prevailing entrapment doctrine is, as jurists have frequently observed, unjustifiable in theory and often perverse in practice.

The Court's majority opinions, for example, repeatedly have suggested that an entrapped defendant who was not predisposed to commit the crime is in some sense not culpable and therefore is an "innocent" who does not warrant punishment. (*E.g., United States* v. *Russell,* 411 U.S. at 434-436; *Sherman* v. *United States,* 356 U.S. at 372, 373, 376; *Sorrells* v. *United States,* 287 U.S. at 451.) But such an individual has by definition violated a criminal statute, with the requisite criminal intent. While one who commits an illegal act under duress may be acquitted under traditional principles of excuse or justification, there is no coercion when the defendant simply takes advantage of criminal opportunities offered by third parties; that is why defendants who succumb to criminal temptations—even unusually large temptations—offered by private actors are treated in all cases as culpable. (*See United States* v. *Twigg,* 588 F.2d 373, 376 (3d Cir. 1978); *United States* v. *Garcia,* 546 F.2d 613, 615 (5th Cir.), *cert. denied,* 430 U.S. 958 (1977).) Accordingly, the defendant's moral blameworthiness cannot be affected by the tempter's hidden identity as a federal agent;[13] irrespective of the identity of the tempter, the defendant intended to commit the act and knew the act to be wrongful. Thus, whatever the wisdom of the government's tempting such an individual may be, it is far from clear that, simply because a person who committed an otherwise criminal act was not "predisposed" to commit the crime, he should be acquitted as innocent. The entrapment defense should rest on a more logical base.

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[9] Most of this literature is collected at Park, *The Entrapment Controversy,* 60 Minn. L. Rev. 163, 167 n. 13 (1976). *See generally* Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain,* 84 Yale L.J. 683 (1975); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution,* 28 Fordham L. Rev. 399 (1959).

[10] *See* American Law Institute, Model Penal Code § 2.13 (Official Draft 1962), prohibiting "methods of persuasion or inducement which create a substantial risk that . . . an offense will be committed by persons other than those who are ready to commit it."

[11] *See* National Commission, A Proposed New Federal Criminal Code § 702(2) (1971), which prohibits "using persuasion or other means likely to cause normally law-abiding persons to commit the offense."

[12] As Justice Frankfurter noted,

> It is surely sheer fiction to suggest that a conviction cannot be had when a defendant has been entrapped by government officers or informers because "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." In these cases raising claims of entrapment, the only legislative intention that can with any show of reason be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged. That conduct includes all the elements necessary to constitute criminality.

(*Sherman* v. *United States,* 356 U.S. at 379 (Frankfurter, J., concurring in the result).)

[13] It never has been the law that conduct is "less criminal because the result of temptation, whether the tempter is a private person or a government informer or agent." (*Sherman* v. *United States,* 356 U.S. at 380 (Frankfurter, J., concurring in the result).)

More sensibly, therefore, the Court also has suggested that the entrapment doctrine serves as an exclusionary rule designed to discourage undesirable or overzealous police tactics. (*See, e.g., Sorrells* v. *United States,* 287 U.S. at 446.) Unfortunately, the Court has made almost no effort to explain which forms of law enforcement conduct are undesirable and precisely why they should be avoided. This omission is important, because the law enforcement activities circumscribed by the entrapment doctrine are, with rare exceptions, neither unconstitutional (*see, e.g., United States* v. *White,* 401 U.S. 745 (1971) (plurality opinion); *Hoffa* v. *United States,* 385 U.S. 293 (1966)) nor violative of the statutory law; indeed, law enforcement activities can lead simultaneously to the conviction of certain defendants (the predisposed) and the acquittal of others (the nonpredisposed). This illustrates the peculiarity of using the entrapment defense as a deterrent: if the purpose of the entrapment doctrine is to discourage particular forms of police conduct, it is odd that the test created by the Court looks to the defendant's state of mind, not to the police activity.

The undesirability of one form of police conduct does seem certain, although the Court has failed to articulate it: police should refrain from offering inducements that are significantly larger than those actually proffered under similar circumstances in the real world or that are attractive enough to persuade virtually anyone in similar circumstances to commit a crime.[14] If similarly situated citizens are unlikely to face equivalent temptations, or if no one similarly situated reasonably can be expected to resist the proffered temptation, it is pointless for law enforcement operations to use inducements of that nature and magnitude: the police will not thereby prevent any crime that was likely to occur, and there is no assurance that they will catch only persons inclined to deviant criminal behavior.

Unfortunately, the existing entrapment doctine fails to further even these sound efficiency concerns. The entrapment inquiry now focuses on the defendant's predisposition, rather than on the police conduct. As a result, the conviction of a predisposed defendant will stand even if he was lured into criminality through the offer of a wildly unrealistic inducement to which most people would have succumbed. Conversely, a defendant snared through the use of reasonable and otherwise proper police methods must be acquitted if he is found not predisposed. These results can hardly provide an intelligible or coherent guide to police behavior. Indeed, the predisposition requirement most likely leads the police to concentrate their attention on individuals with criminal records, for whom predisposition is easy to demonstrate; such individuals may be subjected to virtually any inducement with impunity. As Justice Frankfurter argued, however,

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[14] Philip B. Heymann, when he was Assistant Attorney General, testified that this principle was used as a safeguard by the Department of Justice in 1980 and earlier in undercover operations. (*See* FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 138–40 (1980) (testimony of Philip B. Heymann).)

> Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. . . . Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. (*Sherman* v. *United States*, 356 U.S. at 383 (Frankfurter, J., concurring in the result); *see United States* v. *Russell*, 411 U.S. at 443-44 (Stewart, J., dissenting).)

When it is closely examined, in fact, it becomes evident that the predisposition concept will not constrain police activity in a meaningful way. In modern practice "predisposition" means little more than *present* willingness to commit crime; it hinges on whether "the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded." (1 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 13.09, at 364 (3d ed. 1977).) This definition makes no reference to the size or character of the offered inducement. On its face, then, the existing definition seemingly permits a finding that any defendant who commits any crime in response to any inducement is predisposed, because such a defendant has, by accepting the inducement, demonstrated his willingness to engage in illegal conduct. (*See* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma,* 1981 Sup. Ct. Rev. 111, 118-19, 124-26.) It may be likely that a jury would find that a defendant had been entrapped if a huge inducement had been offered to commit some trivial offense (for example, $5 million to double-park), but such a jury surely would be motivated not by the articulated predisposition principle, but by outrage at the police conduct.

The existing law of entrapment is flawed for another reason. A defendant who argues entrapment must take his case to the jury, giving the prosecution the opportunity to attempt to establish predisposition by offering evidence of prior bad acts, of poor character, and of shady reputation—the very sort of evidence generally excluded from criminal trials for fear of prejudicing the jury. Such information is in some sense relevant to establishing the likelihood that the defendant would have engaged in crime with little temptation by a third party (*see* Park, *supra* p. 364 note 9, at 257); but, given the essentially circular nature of the predisposition inquiry, admitting such evidence inevitably will lead even conscientious juries to condemn defendants with shady pasts simply for being "bad," rather than for having been proved to have committed the crime charged.[15] Results of this type cannot contribute to the principled or evenhanded administration of justice.

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[15] Several courts have recognized this danger and have responded by excluding unduly prejudicial evidence. (*See United States* v. *Ambrose*, 483 F.2d 742, 748 (6th Cir. 1973), and cases cited

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As a theoretical matter, it does seem sensible to allow the offer of inducements to individuals who are engaging in or affirmatively are planning to engage in criminal conduct, while forbidding it as to others.[16] But such an approach seems unworkable in practice, given the subjective nature of the determination involved; and it is not, in any event, the line currently drawn by the predisposition concept. Indeed, these difficulties are illustrated by the definition of entrapment most recently articulated by the Supreme Court. "It is only when the Government's deception actually implants the criminal design in the mind of the defendant," the Court declared in *Russell*, "that the defense of entrapment comes into play." (411 U.S. at 436.) Yet the government's creation and implantation of the illicit idea cannot be all there is to it, for in a substantial number of undercover operations the government concocts the criminal proposal and "implants" it in the mind of the target; indeed, that will be the case almost every time the government offers an inducement to commit a crime.

Pointing out these defects, it should be added, is not to say that the entrapment doctrine in its present form fails to serve any useful purpose. It is arguable, for example, that a potential defendant's "predisposition"—or, in any event, his participation in an ongoing criminal enterprise—bears on the tactics the police might reasonably use in seeking to obtain his conviction. (*See* Park, *supra* p. 364 note 9, at 216). The entrapment doctrine also offers the jury a formal method for disapproving unreasonable or overbearing police tactics. The fact remains, however, that the present entrapment doctrine is incoherent in principle, and will, therefore, inevitably be inconsistent in application.

2. Due process

While a majority of the Supreme Court has maintained that the entrapment defense is based on subjective factors, the Court also has hinted that there may be constitutionally based objective constraints on police undercover activities. This possibility was first suggested in 1973 in *Russell* v. *United States*, where the Court rejected the defendant's entrapment plea because predisposition had been established. In dictum Justice Rehnquist wrote for the Court that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin* v. *California*,

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therein; Park, *supra* p. 364 n. 9, at 251-52.) These protections can go only so far, however; Fed. R. Evid. 405(a) allows the admission of reputation and opinion testimony when character is in issue, and virtually all background evidence relating to predisposition inevitably will be prejudicial to a degree.

[16] The former individuals presumably are particularly dangerous and are the ones most likely to become involved in criminality absent government involvement. It is entirely possible, however, that law enforcement officials will have good reason to direct undercover operations at those who have been or are likely to be offered private inducements. As Professor Seidman notes,

> The argument that a nondisposed defendant is not dangerous because he lacked the disposition to commit the offense before the government intervened is not convincing. As cases such as *Sherman* prove, a person lacking a criminal disposition may nonetheless be quite likely to commit crimes. Indeed, the very fact that an entrapped defendant accepts an inducement conclusively proves that he poses the risk of committing the offense whenever a similar inducement might be offered in the future.

Seidman, *supra* p. 366, at 141.

342 U.S. 165 (1952)." (411 U.S. at 431-32.) The Court thus acknowledged that certain police activity might be constitutionally prohibited as " 'shocking to the universal sense of justice.' " (411 U.S. at 432, *quoting Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).) But the Court concluded that the facts of *Russell*—where the defendant had been convicted of producing methamphetamine after federal agents had provided him with chemicals used in the manufacturing process—did not implicate the constitutional principle.

Unfortunately, the nature, and even the existence, of this due process limitation remains in considerable doubt. Three years after *Russell* had been decided, Justice Rehnquist, writing for himself, the Chief Justice, and Justice White, appeared to repudiate the *Russell* dictum, declaring that "[t]he remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment." *(Hampton* v. *United States,* 425 U.S. 484, 490 (1976) (plurality opinion).) Writing for himself and Justice Blackmun, however, Justice Powell rejected the plurality's proposition that "no matter what the circumstances, neither due process principles nor [the Court's] supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition." (425 U.S. at 495 (Powell, J., concurring in the result).) Justice Brennan's dissent, joined by Justices Stewart and Marshall, appeared to endorse the due process limitation. (425 U.S. at 497 (Brennan, J., dissenting).) The upshot of *Hampton,* then, is that only two sitting Justices have endorsed the due process constraint on police conduct, while two others have declared the question open. Two sitting members of the Court, Justices Stevens and O'Connor, have not yet had an opportunity to address the issue.

In any event, it is clear that any due process limitation will be extremely narrow. Justice Powell's concurring opinion in *Hampton,* for example, noted that cases involving the principle would be "rare," and observed that "police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." (425 U.S. at 495 n. 7.) Similarly, the *Russell* majority gave some hint as to the contours of a due process defense by citing *Rochin* v. *California,* where the Court invalidated a conviction that had been obtained after police had secured evidence by forcibly pumping the stomach of a suspect. While a detailed assessment of the significance of the due process defense will have to await future developments in the Supreme Court, it is evident that due process principles will not take the form of an objective entrapment defense and will not apply to the vast majority of cases in which entrapment presently is pleaded.

B. Proposals for Reform

As the preceding discussion should make clear, the Select Committee has concluded that the existing judicially enforceable constraints on police undercover activity are unsatisfactory. The entrapment doctrine in its present form is constructed around no coherent principle; it serves, at best, as a mislabeled invitation to jury nullification when the defendant is especially sympathetic or the police tactics particularly overbearing. The uncertain future and narrow application of the due process doctrine, meanwhile, make it an inadequate substitute for a meaningful entrapment defense.

In this context, three possibilities for reform immediately commend themselves: simple elimination of the entrapment defense; statutory codification and elaboration of the due process principles recently articulated by the courts; or a modification of the definition of entrapment. The Select Committee concludes that the first of these suggestions is inadvisable and that the second is unnecessary at this point. For reasons explained below, however, the Select Committee finds that the third proposal is both sensible and long overdue.

1. *Elimination of the entrapment defense*

While the possibility of eliminating the entrapment defense has received little attention (*but cf.* Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application,* 1 U.S.F. L. Rev. 263 (1967)), a good case can be made in favor of such a course.[17] If society actually believes that those tempted into criminality are not culpable (a notion that the Select Committee rejects), the substantive criminal law should be modified to reflect that fact and to acquit persons tempted into crime, whether by governmental or by non-governmental actors. If, on the other hand, efficiency considerations lie at the heart of the entrapment doctrine, it would be consistent with the broad discretion awarded police and prosecutors in other areas to allow law enforcement officials to choose for themselves the techniques that are most cost-effective in combating crime. (*See* Seidman, *supra* p. 366, at 143.) Insofar as there is concern that the targets of undercover investigations will be chosen for improper reasons, existing doctrines of equal protection and selective prosecution are available.

While these are provocative arguments, the Select Committee nevertheless believes that an entrapment defense serves a powerful and necessary—even if largely symbolic—function. It reflects the deeply rooted and often unarticulated feeling that "[h]uman nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." (*Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J., concurring in the result).) An entrapment defense also gives force to the general perception that it is inappropriate for the government to "play on the weaknesses of an innocent party and beguile him into committing crimes which he otherwise would not have attempted." (*Sherman* v. *United States,* 356 U.S. at 376.) While we expect government to declare and enforce rules of conduct, we do not expect it to test the moral fiber of the random individual.

Above all else, it is dangerous to give law enforcement officials limitless powers to tempt citizens into criminality and then to punish those citizens for their criminal conduct. It presumably is for this reason that, even absent any explicit Congressional comment, the courts "have continued gropingly to express the feeling of outrage at conduct of law enforcers that brought recognition of the [entrapment] defense in the first instance." (*Sherman* v. *United States,* 356 U.S. at 378 (Frankfurter, J., concurring in the result).) The power to induce criminality is too intrusive to escape regulation, and the Select Committee therefore concludes that the entrapment doctrine should not be eliminated.

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[17] Indeed, the English legal system never has squarely recognized an entrapment defense. *See* Barlow, *Entrapment and the Common Law: Is There a Place for the American Doctrine of Entrapment,* 41 Mod. L. Rev. 266 (1978).

2. Codification of due process principles

One way to forestall the most serious potential abuse of the government's "inducement power" is to codify the due process principles discussed by Justice Powell in *Hampton.* There undoubtedly is a societal consensus that a variety of police practices are unacceptable in most circumstances. Most people would agree, for example, that law enforcement agents should not use threats of harm to any individual's person or property—whether that of the target, of his family, or even of a stranger—to induce targets to commit criminal acts; that police should not manipulate a target's personal or vocational situation—for example, by destroying his property so as to increase his need for money—to increase the likelihood of his engaging in criminal conduct; that police should not entice people into the commission of crimes that could not have been committed without government involvement; that undercover agents should not cultivate intimate relationships with targets, the better to lure them into criminality; and that law enforcement agents should not engage in serious and harmful criminal activity, or intentionally injure innocent third parties, in an attempt to deter crime. (*See generally United States* v. *Archer,* 486 F.2d 670, 676-77 (2d Cir. 1973).) There is little doubt that the costs of such tactics—both to the target and to society—are likely to outweigh by a substantial amount the benefits gained through deterrence of crime. (*Cf. Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).)

Given the uncertain status of the due process defense in the Supreme Court, then, it can be argued that Congress should by statute make clear the power of the federal courts to void convictions obtained through use of "outrageous" police practices. Such an approach would demonstrate the unacceptability of overbearing methods of law enforcement, regardless of the outcome of the constitutional litigation currently ongoing in the courts. It also would more candidly reflect the case-by-case jury nullification function now served by the entrapment defense.

On balance, however, the Select Committee believes that legislation of this sort is not yet needed. While the Select Committee's investigation and the reported court decisions addressing due process issues have revealed instances of poor judgment and occasional overzealousness on the part of federal law enforcement officials, there is little evidence that federal agents engage in overbearing practices with sufficient frequency to justify such broad legislation in this area.

Further, a general outrageousness standard would provide law enforcement officials and the judiciary with little useful guidance. Unacceptably intrusive undercover tactics cannot all be identified through the use of a simple formula; the courts that have struggled with due process claims have emphasized that any assessment of an operation's propriety must look to the totality of the circumstances, including the law enforcement tactics used, the investigative background, and the target's situation. (*See United States* v. *Tobias,* 662 F.2d 381, 387 (5th Cir. 1981); *United States* v. *Brown,* 635 F.2d 1207, 1212-13 (6th Cir. 1980).) For the present, the Select Committee is content to leave the general problem of overbearing police conduct in the hands of the courts, with the expectation that they will void convictions obtained through methods that truly shock the public conscience.

3. An objective entrapment standard

In the Select Committee's view, then, some form of judicially enforceable entrapment defense should be preserved, but it should not be aimed broadly and generally at undefined offensive practices. On balance, the Select Committee concludes that the evenhanded administration of justice can best be served by redrawing the entrapment doctrine along objective lines to serve limited and clearly defined purposes, while leaving ample room for the use of innovative and effective law enforcement techniques. Devising a formula to achieve these ends, however, is no simple task.

Unfortunately, the minority Supreme Court opinions advocating an objective entrapment standard provide little help. Those opinions devote far more space to criticizing the majority approach than to formulating a coherent alternative. As a result, they are surprisingly vague when articulating a standard for, or even when stating the purposes to be served by, an entrapment defense. Justice Stewart, for example, proposed that entrapment be found "when the agents' involvement in criminal activity goes beyond the mere offering of . . . an opportunity [to commit an offense], and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready or willing to commit it. . . ." (*United States* v. *Russell,* 411 U.S. at 445 (Stewart, J., dissenting).) Similarly, Justice Frankfurter opined that his formula did "not mean that the police may not act so as to detect those . . . ready and willing to commit further crimes. . . . It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only those persons and not others." (*Sherman* v. *United States,* 356 U.S. at 383-84 (Frankfurter, J., concurring in the result).) While the substance of these formulations is less than entirely clear, it appears to rule out most "proactive" police behavior, for fear of leading into criminality individuals who never would have violated the law but for the government inducement. (*See id.* at 383.)

The Select Committee finds this approach too restrictive of legitimate law enforcement operations. Taken literally—that is, forbidding the police from going beyond "the mere offering of . . . an opportunity" to commit crime—the Frankfurter-Stewart standard fails to take into account the fact that an undercover technique may appear impermissibly intrusive in one context and not in another: repeated solicitation and the offer of premium prices may seem an improper way of luring a novice into the narcotics trade, for example, but such tactics appear more reasonable when the police are attempting to catch a cautious professional drug dealer. (*See* Park, *supra* p. 364 note 9, at 253.) Similarly, a line drawn between the passive "offering of an opportunity" to commit crime and the more active "solicitation" of illegal activity would eliminate some important and desirable law enforcement techniques. When police suspect, but cannot otherwise prove, that consensual crimes are taking place, for example, solicitation may be an entirely reasonable method of investigation.

The superficially attractive phrases that regularly appear in the Court's opinions have little real content; if applied rigorously, tests employing those phrases would impair universally accepted methods of law enforcement. Thus, virtually every entrapment opinion, majority or minority, produced by the Court has declared that an entrapment defense must prevent the conviction of those who, "left to themselves, might well have obeyed the law." (*Sherman* v. *United States*, 356 U.S. at 384 (Frankfurter, J., concurring in the result).) But it will be impossible in any case to tell whether the defendant would have engaged in criminality absent government involvement; if the law enforcement operation replicates the real world and the defendant takes the proffered bait, it may be likely—but never can be certain—that the defendant ultimately would have been led into criminality by private actors.[18] It is difficult to believe, however, that either the majority or the minority Justices would acquit all such individuals. This point is well illustrated by the "decoy" operations commonly used by local police, in which undercover agents are disguised as vulnerable potential crime victims: few jurists would suggest that an individual who attacks a police decoy should be acquitted on entrapment grounds, even if the defendant persuasively claims that he never would have engaged in criminality had it not been for the decoy's presence.[19]

The minority Justices' proposed tests similarly are flawed to the extent that they would use the entrapment doctrine to bar the government from "instigating" crime, or from being the "but for" cause of criminal acts. Whenever law enforcement agents offer an inducement or provide an opportunity for the commission of a criminal offense, they become a "but for" cause of the resulting crime, and to that extent they instigate an offense that otherwise would not have occurred. This is true, for example, in the decoy situation outlined above.

Designing an entrapment defense, then, requires a candid recognition that the entrapment doctrine has very little to do with culpability, and very much to do with directing law enforcement efforts into effective and socially desirable channels. Thus, while police should not, as a general matter, attempt to lure into criminality individuals who previously have shown no inclination to engage in criminal conduct, entrapment is not the most effective means of preventing such police activities. To the contrary, that goal can best be achieved by imposing direct restraints on the use of undercover operations—for example, by requiring an articulable suspicion that an individual is involved in criminality before offering him an inducement. (*See* pp. 377–89 *infra*.) A manageable entrapment defense should serve two comparatively limited purposes: It should discourage the criminal justice system from punishing governmentally induced lawbreakers, when doing so will fail significantly to advance legitimate law enforcement purposes, and it should prevent overzealous or improperly motivated officials from abusing their power to create criminals.

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[18] Certainly, this does not put the entrapped defendant in a position morally superior to that of the individual led into criminality by a private actor; absent coercion by the government, the entrapped defendant, like his non-entrapped counterpart, freely chose to engage in a criminal act.

[19] As Professor Seidman acknowledges, an equivalent inducement,

> might never be offered [by a non-governmental actor]. But all predictions of dangerousness are contingent and uncertain. The case of an entrapped defendant, moreover, is crucially different from that of a person incarcerated for an inchoate crime or a presumed disposition to commit crimes. In the latter situations, the defendant has not yet performed a criminal act, and we therefore must speculate whether, if left alone, he will ever violate the law. But the entrapped defendant *has* violated the law. He has performed an act that the law condemns, and incapacitating him for reasons of dangerousness is no different in principle from incapacitating any other criminal on this basis.

Seidman, *supra* p. 366, at 141.

One possible objective standard that has received some attention and that would further the principles outlined above is a test that would bar use of inducements substantially larger than those likely to occur in the real world. (*See* Seidman, *supra* p. 366, at 121, 143.) As has been noted, it certainly seems desirable as a matter of policy for the police to design undercover operations that mirror reality; as a general matter, offering an unrealistically large inducement does little more than test the moral fiber of the target.

An entrapment test based on this criterion, however, is apt to be unsatisfactory for three reasons. First, it often will be impossible for the prosecution to establish to any degree of certainty that the proffered inducement replicates those occurring absent government involvement. Second, requiring the police to prove that the inducement mirrors the real world may force them to reveal sensitive law enforcement data or the identities of confidential sources. Finally, there may be situations in which the offer of an unrealistically generous inducement might be appropriate. For example, when authorities believe, but are otherwise unable to prove in court, that a narcotics dealer is selling his goods to third parties, the offer of a premium price to divert the drugs into government hands may not be unreasonable.

The Select Committee therefore recommends another version of the objective standard, one similar to that developed more than ten years ago by the National Commission: A defendant should be acquitted on entrapment grounds when a law enforcement agent—or a private party acting under the direction or with the approval of law enforcement authorities—induces the defendant to commit an offense, using methods that would be likely under similar circumstances to cause a normally law-abiding citizen to commit a similar offense. As the National Commission added, however, the mere offer of an opportunity to commit a crime should not in itself constitute entrapment. (*See* National Commission, A Proposed New Federal Criminal Code § 702(2), at 58 (1971).)

This definition serves the principal purposes that have been articulated in support of an entrapment defense. It circumscribes the government's power to create criminals, making it impossible for law enforcement agents to lure normally law-abiding individuals into criminality through the use of extraordinarily large, literally irresistible inducements.[20] At the same time, it forestalls the practical risk that, once into an investigation, agents will feel overwhelming pressure to use overbearing tactics in pursuit of a conviction. It thus serves to prevent the use of some of the most offensive of the police tactics mentioned above.[21]

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[20] We do not mean the word "inducement" to signify only offers of gain; a threat or other form of coercion may also induce a defendant to commit a criminal act.

A standard pegged to the "normally law-abiding individual" also would serve efficiency concerns by discouraging ineffective law enforcement activities. While undercover operations generally can be expected to have a substantial deterrent effect on crime, the conviction of an individual who responded to an "irresistible" inducement is unlikely to deter persons who find themselves facing similar offers in the future. Conversely, if the inducement is sufficiently large that it would lead substantial numbers of people into criminality, the fact that a defendant responded to that inducement reveals very little about whether he is the sort of dangerous individual who should be subjected to specific deterrence.

Equally as important, the proposed formula preserves wide latitude for law enforcement operations. As is demonstrated by the narrowness of the existing excuse and justification defenses, individuals are expected to obey the law in virtually all circumstances: poverty, drug addiction, immediate financial reverses, and the like are not considered sufficent cause for a defendant to violate the law. This is not to say that a law-abiding individual is empirically likely to commit an offense only when the technical requirements of duress or its sister defenses have been met. But the narrowness of those defenses—along with the fact that the vast majority of the citizenry is expected to, and does, resist the temptation to commit illegal acts—suggests that only extraordinary pressures are likely to lead normally law-abiding individuals into criminality. Certainly, "[t]he man on the Clapham omnibus would not sell heroin even if he were offered inducements that would be quite tempting to a member of the drug culture." (Park, *supra* p. 364 note 9, at 173.) In this context, the "normally law-abiding individual" standard may be "viewed as a warning that inducements will not be condemned merely because they require the target to exercise a substantial amount of self-control." (*Id.* at 174.) Thus the focus of the entrapment inquiry is pointedly placed on the law-abiding individual, rather than on the "chronic" or professional criminal. (*See* 1 National Commission Working Papers 321.) In any event, it is worth noting that at least six states have adopted objective entrapment tests modeled on the American Law Institute or National Commission proposals (*see* Park, *supra* p. 364 note 9, at 168–69, and notes 15–16), without suffering catastrophic effects on their criminal justice systems.

If the federal entrapment standard is modified along the lines discussed above, a variety of procedural issues will have to be resolved.[22] The Select Committee concludes that it would be appro-

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[21] It is worth noting, however, that many offensive police tactics will will not activate an entrapment defense such as that outlined in text. Our proposed standard, for example, obviously will not prevent law enforcement agents from engaging in serious criminal acts during the course of an undercover operation, unless those acts exert pressure upon the target to commit a crime. (*Cf. United States* v. *Archer*, 486 F.2d at 676–77.)

[22] These include questions relating both to the burden of proof when entrapment is pleaded and to the propriety of raising inconsistent claims when the defendant wishes both to deny guilt and to plead entrapment. On these issues, we endorse the conclusion of the National Commis-

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priate for these to be addressed by the Committee on the Judiciary. The Select Committee notes, however, its agreement with the National Commission and with those commentators who would have the entrapment issue presented to a judge, rather than to a jury. (*See* 1 National Commission Working Papers 325 and note 135.) The "normally law-abiding individual" standard does not require the resolution of any factual issues, and it does not, of course, purport to hinge on the innocence of the accused, two areas that typically are the province of the jury. Indeed, because it is intended to mold police behavior, having the standard applied by judges who can articulate its requirements in a consistent manner might be especially helpful.

4. *Entrapment per se*

The entrapment doctrine we have proposed is a limited one, with a particular meaning: it provides a defense to defendants who truly are "trapped" by law enforcement techniques that, if used against other citizens, would be likely to ensnare many of them. So defined, entrapment obviously does not bar the use of all law enforcement tactics that much of the population would find offensive. (*See* note 21 *supra.)*

A few undercover practices, however, seem to be so overbearing as to be unacceptable in virtually every situation and are related to entrapment in that they are relatively likely either to ensnare harmless individuals or to impose on otherwise law-abiding persons coercive pressure to commit crimes. Three such offensive practices, alluded to above (*see* pp. 370–71) *supra*), are: (1) the use of threats by police to induce targets to commit criminal acts; (2) the manipulation by police of a target's personal or vocational situation to increase the likelihood of the target's engaging in criminal conduct; and (3) the enticement of persons into the commission of crimes that could not have been committed without government participation. It is the Select Committee's view that these three techniques are extraordinarily harmful to the individual, are fundamentally inconsistent with the basic values of our society, and are unnecessary for effective law enforcement. The Select Committee therefore recommends that defendants induced to commit crimes through the use of such tactics be acquitted on entrapment grounds per se.

As a general matter, the circumstances surrounding convictions obtained through threats, manipulation, or the facilitation of otherwise impossible criminal acts are apt to be similar to those characterizing the usual entrapment situation. Operations involving any of these three tactics are far more likely than are conventional undercover investigations to ensnare individuals who never would

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sion. Since the defendant seeks to avoid the consequences of having committed a criminal act by pleading entrapment, it seems reasonable to require the defense to establish entrapment by a preponderance of the evidence. (*See* 1 National Commission Working Papers 324.) On the second issue, current practice, with some exceptions, bars the defendant from pleading entrapment if he has denied the ocurrrence of the underlying criminal transaction. (*See, e.g., United States* v. *Rodriques*, 433 F.2d 760, 761–62 (1st Cir.), *cert. denied*, 401 U.S. 943 (1971); *United States* v. *Pickle*, 424 F.2d 528, 529–30 (5th Cir. (1970).) This practice cannot be reconciled with the generally permissive attitude taken towards inconsistent defenses in most other contexts, and we believe that it would be wise to eliminate the pleading limitation in the entrapment area as well. (*See* 1 National Commission Working Papers 325–26.)

have committed criminal acts absent government involvement, for none of these tactics is likely to be replicated in the real world. While there obviously are exceptions,[23] there is little doubt that most people who engage in criminality do so willingly, rather than in response to coercive actions by third parties; and, if the crime could not have been committed without the government's participation, there was by definition no danger that the defendant, no matter what his criminal intentions, was going to commit such a crime. Meanwhile, so far as the first two techniques are concerned, the use of the government's resources to threaten or to manipulate a defendant is apt to put even the most law-abiding individual at a serious disadvantage.

Hence each of the tactics mentioned above shares several of the most important characteristics of the classic entrapment situation. Each poses an inordinate risk of involving in criminality defendants who pose little threat to engage in such criminality. Each provides the overzealous law enforcement agent with an unnecessarily powerful tool that can be used to create criminals. And, even if there is some chance that the offensive technique will be replicated by a nongovernmental actor, so that its use in an undercover operation might serve a legitimate deterrent purpose, police adoption of the methods outlined above seems inappropriate, for want of a better formula, as truly "shocking to the universal sense of justice."

This conclusion derives from the Select Committee's view that the function of government is substantially perverted when executive power is used to coerce individuals into criminality or to facilitate the commission of crimes by those who could not or clearly would not otherwise have violated the law. At the same time, the perception that convictions were obtained through the use of overbearing or fundamentally unfair methods inevitably will have a pernicious effect on public faith in the system of criminal justice. While there is a consensus that the government should attempt to solve and deter acts of criminality, it also is the general view that the individual should be able to avoid punishment unless he truly chooses to violate the law. Thus, the duress defense and related judicial doctrines demonstrate our reluctance to convict those who commit crimes unwillingly—a circumstance that makes the government's role in placing the individual in such a morally ambiguous situation particularly offensive. The Select Committee would forestall these dangers by making use of the tactics mentioned above an affirmative defense to charges stemming from their application.

Again, as with the general entrapment defense discussed in the preceding section, the Select Committee would place the burden of persuasion here on the defense. To obtain an acquittal on entrapment grounds the defendant must, by definition, have committed a criminal act, and there are substantial costs associated with releasing such individuals. The Select Committee therefore recommends that entrapment per se be established when the defendant demonstrates by a preponderance of the evidence that he was induced to commit the charged offense by one of the overbearing tactics discussed above.

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[23] The most obvious exception is the individual who offers a bribe to a public official in response to a threat of adverse official action. It is worth noting, however, that even in this situation courts have been reluctant to convict such individuals of bribery; jurists have suggested that the victim of extortion cannot have the specific intent necessary for completion of the bribery offense. (*See, e.g., United States* v. *George*, 477 F.2d 508, 514–15 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *United States* v. *Barash*, 365 F.2d 395, 401–02 (2d Cir. 1966).)

III. A RECOMMENDATION FOR LEGISLATION ESTABLISHING THRESHOLD REQUIREMENTS FOR THE INITIATION OF AN UNDERCOVER OPERATION

The Congress, through its appropriate committees, should consider legislation providing that:

1. no component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except,

(a) when the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, upon a finding that there is reasonable suspicion, based upon articulable facts, that the individual has engaged, is engaging, or is likely to engage in criminal activity;

(b) when the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, upon a finding that there is reasonable suspicion, based on articulable facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type; provided that if, during the course of the operation, agents of the Department of Justice wish to offer to a specific individual—who is identified in advance of the offer—an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion, based upon articulable facts, that the targeted individual has engaged, is engaging, or is likely to engage in criminal activity;

(c) when a government agent, informant, or cooperating individual will infiltrate any political, governmental, religious, or news media organization or entity, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

(d) when a government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person, upon a finding that there is probable cause to believe that the operation is necessary to detect or to prevent specific acts of criminality;

2. when certain specified sensitive circumstances (including those currently listed in Paragraph B of the Attorney General's Guidelines on FBI Undercover Operations) are present or are reasonably expected to materialize during the course of the undercover operation, the finding of reasonable suspicion required by subsection (1) (a) or (b) above shall be made by the Undercover Operations Review Committee following procedures to be specified in guidelines. When there is no expectation that the *operation will involve such sensitive circumstances, that determination shall be made by the Special Agent in Charge or by the equivalent official in the field following procedures to be specified in guidelines. Findings of probable cause, as required by subsection (1) (c) or (d) above, shall be made by the Undercover Operations Review Committee, following procedures to be specified in guidelines;*

3. when the initiation, expansion, extension, or renewal of an undercover operation is necessary to protect life or to prevent other serious harm, and when exigent circumstances make it impossible, before the harm is likely to occur, to obtain the authorization that would otherwise be required, the Special Agent in Charge or the equivalent official in the field may approve the operation upon his finding that the applicable requirements of subsection (1) have been met. A written application for approval must then be forwarded to the Undercover Operations Review Committee at the earliest possible opportunity, and in any event within 48 hours of the initiation, expansion, extension or renewal of the operation. If the subsequent written application for approval is denied, a full report of all activity undertaken during the course of the operation must be submitted to the Director and to the Attorney General;

4. a failure to comply with the provisions of this statute shall not provide a defense in any criminal prosecution or create any civil claim for relief.

As shown above, the Select Committee has concluded that the enactment of coherent, practical, and effective legislation establishing a statutory entrapment doctrine is essential to maintain public faith in the system of criminal justice, to restrain overzealous law enforcement conduct, to provide intelligible guidance to law enforcement officers, and to safeguard civil liberties of citizens. For several reasons, however, even an effective entrapment defense does not, standing alone, adequately promote those goals.

First, neither the objective entrapment test advocated by the Select Committee nor the judicially created predisposition standard now in force will in practice forestall any but the most intrusive undercover operations involving the most overbearing tactics. Thus, for example, neither formulation of the entrapment doctrine will prevent the conviction of particular individuals who can prove that they were unlikely to have engaged in criminality absent governmental involvement; and, accordingly, the entrapment doctrine will not forestall police operations aimed at convicting such citizens of crimes. As the preceding section of this report suggests, however, the conviction of such generally law-abiding citizens imposes severe and unnecessary costs on the defendants and fails to serve any significant law enforcement purpose (*See* pp. 362–77 *supra.*)

Entrapment principles also do not prevent or remedy the unnecessary violations of privacy that attend undercover operations aimed at innocent individuals who are not suspected of, and who do not ultimately engage in, wrongdoing. Further, even where it applies, the entrapment defense, like all exclusionary remedies, is inefficient: It does not establish that a given undercover investigation was conducted improperly until after law enforcement resources have been expended for the operation and for the resulting prosecutions.[24]

Therefore, the Select Committee recommends that Congress impose direct limits on the use of the undercover technique and circumscribe the situations in which inducements to engage in criminality may be offered. The contours of these limitations should, in the manner described below, be defined by the need for effective law enforcement and by the harms likely to be caused by unrestrained undercover activity.

A. Existing Law

While the Supreme Court has required law enforcement agents to demonstrate probable cause and to obtain a warrant before searching property or engaging in wiretapping and other nonconsensual electronic monitoring, it has not imposed a corresponding constitutionally based limitation on the use of informants or undercover operations. To the contrary, the Court has held that no constitutional problem is raised when a defendant acts "upon misplaced confidence" that an undercover informant would not reveal the defendant's wrongdoing. (*Hoffa* v. *United States,* 385 U.S. at 302.) As the majority noted in *Hoffa,* "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." (*Id.; see United States* v. *White,* 401 U.S. at 751.)

Even the Justices advocating the strictest constitutional restrictions on official searches and seizures have conceded that "[t]he risk of being . . . betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." (*United States* v. *Lopez,* 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).) Similarly, no Justice has suggested that a warrant must be obtained before police may offer an individual inducements to engage in criminal acts. (*Cf. Hampton* v. *United States,* 425 U.S. 484 (1976); *United States* v. *Russell,* 411 U.S. 423 (1973).)

A greater controversy has been sparked by the suggestion that a warrant requirement should be imposed on undercover agents who seek to engage in consensual electronic monitoring.[25] Even on this issue, however, a majority of the Court has maintained that one cannot "liken [electronic] eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure." (*United States* v. *On Lee,* 343 U.S. 747, 754 (1952).) Such warrantless consensual recording and monitoring has been upheld by analogy to those cases finding the use of informants to be outside the Fourth Amendment: "We think the risk that [the defendant] took in offering a bribe to [a law enforcement agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

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[24] The entrapment plea is also notoriously ineffective. Even a defendant who is acquitted on entrapment grounds is likely to suffer a permanently damaged reputation. (*See* pp. 363–67 *supra.*)

[25] By "consensual electronic monitoring" the Select Committee means the taping or transmission of a conversation with the acquiescence of one, but not all, of the parties.

(*United States* v. *Lopez,* 373 U.S. at 439.) This conclusion was reaffirmed more recently in *United States* v. *White,* 401 U.S. at 751–53, and *United States* v. *Caceres,* 440 U.S. 741, 750–51 (1979).[26] In effect, the Court has thus concluded that the person subjected to consensual monitoring, unlike the subject of a wiretap or "bug" (*see Katz* v. *United States,* 389 U.S. 347 (1967)), has no constitutionally protected "expectation of privacy" in his overheard conversations.

While the Court has discovered no constitutional or statutory constraint on the initiation of undercover operations or on the offer of criminal inducements, some limitations are imposed by Department of Justice guidelines. The Criminal Investigations Guidelines provide that no investigative operation may be initiated unless "facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed" (Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations I, ¶ C(1) (Dec. 1980)); and no undercover domestic security investigation may be initiated unless there is a factual predicate for a belief that the investigation will reveal evidence of criminality (*see* Attorney General's Guidelines on FBI Undercover Operations, General Authority (2) (Jan. 1981)). Similarly, the FBI Undercover Operations Guidelines require, as a general matter, that FBI undercover operations "involving an invitation to engage in illegal activity" not be initiated unless, among other things, "the approving authority [is] satisfied that . . . [t]here is a reasonable indication that the undercover operation will reveal illegal activities." (Id., ¶ J(2)(b).)

There are, however, important gaps in the coverage of the guidelines. Section I, paragraph D(1) of the Criminal Investigations Guidelines permits undefined "inquiries" to be initiated on the basis of "information or an allegation not warranting full investigation." Paragraph K of the FBI Undercover Operations Guidelines provides that undefined "routine investigative interviews" and undefined "so-called 'pretext' interviews" may be conducted without the approval of FBI HQ or of a Special Agent in Charge. Equally as important, paragraph J(3) of the FBI Undercover Operations Guidelines expressly contemplates that the Director, and under certain circumstances the Undercover Operations Review Committee, may approve the offer of criminal inducements to an individual "even though there is no reasonable indication that that particular individual has engaged, or is engaging, in the illegal activity." Finally, the guidelines governing DEA undercover operations are substantially weaker than those governing FBI operations, and the INS has no guidelines at all.

B. The Intrusiveness of Undercover Operations

Department of Justice officials have defended the existing law governing undercover investigations by arguing that undercover techniques are not as intrusive as other law enforcement and judicial techniques, such as searches, compelled grand jury testimony, and subpoenas for documents. (*See, e.g.*, FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 141–42 (1980) (statement of Philip B. Heymann).) They also noted that the target of an undercover operation makes his incriminating disclosures voluntarily and that someone who wants to avoid the risk that he is revealing his thoughts to a government agent can simply stop speaking to his associates. (*See id.*) Similarly, they suggest that there is little danger of a criminal inducement's being offered to a law-abiding citizen, because undercover operations generally are structured to make clear the illegal nature of the transaction. (*See, e.g., id.* at 139–40.) In the Select Committee's view, however, these contentions are seriously flawed, and undercover techniques are highly intrusive, important though they are to effective law enforcement.

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[26] The Court concluded in those cases that the vitality of its earlier decisions had not been affected by its 1967 holding in *Katz* v. *United States,* 389 U.S. 347 (1967), that electronic surveillance implicates the Fourth Amendment.

The contention that the use of informants does not affect the same privacy interests as do physical searches and wiretaps cannot withstand scrutiny. Advocates of that position have argued that, because a disgruntled friend or colleague can always disclose an individual's words or acts to law enforcement authorities after the fact, informants and government undercover agents, too, should be permitted to disclose such words or acts after winning the individual's confidence. That argument assumes that precisely the same factors are at work when a private party informs on a citizen as are involved when a government undercover agent extracts the incriminating information himself. But a parallel argument can be made as to searches or wiretaps: If a third party searches a defendant's home or taps a defendant's telephone and provides any information thus obtained to the government, the government is free to use it in a subsequent prosecution. It never has been suggested, however, that the government may for that reason itself tap an individual's telephone or search his residence without first obtaining a warrant on a showing of probable cause that a crime has been, is being, or is about to be committed. Similarly, the risk that an individual's confidence might subsequently be betrayed by a disloyal associate is greatly magnified when it is made to include the additional risk that the listener to whom the individual reveals his confidence is a disguised government agent whose prearranged mission is to elicit incriminating information. (*See* FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 4 (1981) (statement of Geoffrey R. Stone); *cf. United States* v. *Lopez,* 373 U.S. at 449 (Brennan, J., dissenting).)

Accordingly, it is beyond reasonable dispute that undercover operations can and often do invade legitimate privacy interests in significant ways. Aside from sting and decoy operations, undercover investigations generally progress by having an agent or an informer first win the confidence of the target and then obtain incriminating information. In the course of that mission, the undercover technique is likely to be fully as intrusive as a conventional wiretap. As the Abscam tapes reveal, for example, undercover agents almost invariably will learn significant amounts of information about the personal lives and political views of targets, including targets who ultimately are revealed to be innocent.[27] This danger is compounded by the fact that virtually everything the target says and does will be captured by cameras and tape recorders and will be subject to the risk of being leaked. More generally, as Justice Harlan noted in a somewhat different context, the widespread, unregulated use of informants and undercover agents inevitably will inhibit public discourse by "undermin[ing] that confidence and sense of security in dealing with one another that is the characteristic of individual relationships between citizens in a free society." (*United States* v. *White,* 401 U.S. at 787 (Harlan, J., dissenting).)

Undercover operations that include offers of inducements to commit crimes are intrusive in other ways, as well. While the practice of making clear the illegal nature of such inducements is an important safeguard,[28] the FBI Undercover Operations Guidelines nevertheless clearly permit undercover operatives to offer unrealistically large inducements and to tempt individuals who otherwise would be unlikely ever to become involved in criminality. As is elsewhere noted, convictions obtained by such practices serve almost no sound law enforcement purpose. Moreover, as events in Abscam dramatically demonstrate, the mere offer of a criminal temptation, even to a citizen who refuses it, can, when memorialized by hidden cameras and microphones, be very intrusive and harmful.

C. The Select Committee Proposal for Reform

Many of the cases that have arisen under the Fourth Amendment to the Constitution demonstrate that even the most well-intentioned officials occasionally will be overzealous in the pursuit of crime and will engage in unjustified investigative activities. The Constitution protects against the most egregious of those activities, but it lies with Congress to attempt to establish the optimal balance between the protection of privacy interests and the preservation of effective law enforcement techniques. The Select Committee suggests that its recommendations establishing threshold requirements for the initiation of undercover operations and for the offer of inducements to engage in criminal acts will move us much closer to that optimum.

The approach proposed by the Select Committee closely follows that used by the Supreme Court and by the existing FBI Undercover Operations Guidelines in their attempts to reconcile competing privacy and law enforcement interests: Thus, the Select Committee's proposal first requires that, before initiating an undercover operation, a federal law enforcement agency must make a threshold determination that there is a factual basis for believing that the investigation will reveal evidence of specific criminality. This approach has several salutary effects. It gives citizens some assurance that they are not being arbitrarily or for improper reasons subjected to misleading and intrusive governmental action. It requires a reasoned determination by the government, *before* the intrusion takes place, that scrutiny of particular citizens is necessary. It strikes an historically justified balance between the individual citizen's interest in being left alone and society's need for effective law enforcement.

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[27] It is true that an undercover agent can attempt, within limits, to keep conversations involving targets focused on the suspected illegality that is the subject of the investigation. But, as the Abscam transcripts reveal, it obviously is unrealistic to expect agents or informants to refuse to engage targets in any "non-business related" discussions.

[28] It is worth noting, however, that this requirement is found in only the FBI Undercover Operations Guidelines. No corresponding limitation, for example, appears in the current DEA Guidelines.

The specifics of the Select Committee's proposals are designed to further these principles by closing some of the gaps in the existing guidelines, while allowing for the creation of a flexible and manageable procedural framework. Thus, before a specific, previously targeted individual or group of individuals is subjected to an undercover investigation, Paragraph 1(a) of the proposal requires a finding, based upon articulable facts, of a reasonable suspicion [29] that the targeted individual or group has engaged, is engaging, or is likely to engage in criminal activity.

This standard would apply to all undercover operations and to all uses of the undercover technique, including "preliminary inquiries" and "pretextual interviews," however those undefined terms have been or may be applied by components of the Department of Justice. In the Select Committee's view, neither a particular use of the undercover technique nor the stage at which it is used in an investigation significantly affects the degree to which it intrudes upon privacy interests, the resentment likely to be felt by citizens who discover that they have been misled by federal agents, or the risks of abuse that are peculiar to the undercover technique.

Moreover, a reasonable suspicion should be required not only when an operation is initiated, but also when federal authorities seek to renew a previously authorized operation, to use undercover techniques against a new target, or to expand the scope of the operation beyond the geographic or subject-matter boundaries that initially were approved. The proposal establishes such a requirement by use of the words "expand," "extend," and "renew" [30] in the introduction to the proposal's section "1." If the reasonable suspicion requirement were not to apply to such expansions and extensions, the law enforcement agency could readily circumvent all of the threshold requirements for a new operation simply by expanding and extending without limitation any of its existing operations. This, essentially, is a license that the FBI has under the existing guidelines.

Similarly, whenever the authority that approved the operation—in the FBI, either the Undercover Operations Review Committee or a Special Agent in Charge—determines that there no longer is reason to believe that the target was, is, or will be engaging in criminality or concludes that the original "reasonable suspicion" was not well-founded and that no additional incriminating information has come to light since the initiation of the investigation, that authority should terminate the operation.[31] That obligation is imposed in the proposal by use of the word "maintain" in the introductory clause to section "1."

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[29] This standard, which is familiar to law enforcement officials from Fourth Amendment law (*see, e.g.*, FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 157 (1978) (testimony of Griffin B. Bell)), requires a specific factual basis for the belief that criminality will be found. The reasonable suspicion test apparently is the standard currently required by the Criminal Investigations Guidelines for criminal investigations, but not for "inquiries." (*See* Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations I, ¶ C(1) (Dec. 1980).)

This standard cannot be met by assertions such as, "Everyone knows that politicians are corrupt," or even by the arguably accurate assertion that some number of individuals in every discrete group are likely to be lawbreakers. Those assertions are not specific facts relating to the particular situations under investigation.

[30] These terms are included in order to make clear that the proposed requirement is meant to reach the expansion of operations into new investigative areas, the temporal extension of operations, and the outright renewal of investigations.

Proposal 1(b) imposes parallel requirements on the initiation and modification of operations that are not aimed at previously identified individuals or that, like sting and decoy investigations, are intended to offer to the public at large an opportunity to engage in criminality. This recommendation is intended to place limitations on the use of scattershot operations that may obtain a vast amount of information about substantial numbers of people. Again, the proposed legislation would require, before the use of intrusive techniques is authorized, a reasonable suspicion that evidence concerning a particular type of criminality will be discovered.[32] The concluding proviso to subsection 1(b) is intended to ensure that subsections 1(a) and 1(b) are read in conjunction: It makes clear that, when a specific individual's name comes to the attention of federal authorities during the course of an "umbrella" operation—as happened, for example in Abscam [33]—authorities must have a factually based, reasonable suspicion of criminality concerning that individual before offering him an inducement to engage in criminality.

The remaining provisions of section "1" articulate a higher threshold test that must be met before undercover techniques may be employed to infiltrate entities that were organized to further legitimate political, governmental, religious, or journalistic ends and before undercover agents or informants are allowed to impersonate certain types of individuals who are especially likely to elicit confidences from third parties. The higher threshold requires probable cause to believe that specific acts of criminality have been, are being, or will be committed. Investigations in such sensitive circumstances are considerably more intrusive than are conventional undercover operations, a fact acknowledged both by Director Webster (*see, e.g.*, FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 156, 159 (1978) (testimony of William H. Webster)), and, albeit in slightly different form, by the proposed FBI charter legislation (*see* S. 1612, 96th Cong., 1st Sess. § 531a(d) (1981)).

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[31] This obligation is facilitated by the reporting requirements elsewhere recommended by the Select Committee, in particular by Recommendation as to Administrative Directives A(5)(i)(*v*) and B (*See* pp. 31-32 *supra.*)

[32] This imposes a requirement of some specificity in the planning and implementation of the operation. General authorization requests—for example, that which appeared in the "catch-all" provision of the Abscam authorization document (*see* pp. 15-16 *supra*)—would not be proper. Also, an application, like the Goldcon application, that lists many different targets, many different criminal activities, and many different geographic areas would have to state articulable facts justifying each aspect of the proposed investigation. It simply will not do, for example, to allow field agents who have stated articulable facts justifying an investigation of narcotics sales in Cleveland to use those narrow facts to justify an investigation of stolen property in Toledo or of racketeering in Akron.

[33] Under the proposed standard it would have been improper for the FBI to use undercover techniques to investigate or to offer inducements to individuals, such as Senator Pressler, whose names were forwarded, without corroboration, by a wholly unreliable middleman such as Joseph Silvestri.

Where First Amendment interests are involved, the possibility of government infiltration can easily inhibit valuable, protected expression. Were agents of the executive branch to insinuate themselves into Congressional offices, for example, substantial separation of powers concerns would arise. The surreptitious placement of federal agents within political bodies may, over the long term, result in the agents' affecting significant decisions for those organizations.

Similarly, society has determined that assuring a free flow of information between private parties and those persons mentioned in subsection 1(d) is so important that privileged communications are inadmissible even at criminal trials. The use of agents posing as lawyers, physicians, clergymen, or reporters may have a considerable inhibitory effect on the exchange of such privileged information.

Most importantly, use of the undercover techniques mentioned in subsections 1(c) and 1(d) is more likely than are conventional wiretaps or searches to reveal legal, but intensely private, information that people seek to protect, for each of those undercover techniques elicits information by winning the confidence of unsuspecting persons and thereby exposing their innermost thoughts. The Select Committee therefore believes that, in these circumstances, the balance between privacy and law enforcement should be weighted in favor of the individual.

Similar factors motivated the Select Committee's proposal in section "2." As Fourth Amendment law has shown, privacy interests can be safeguarded in two ways: (1) By imposing stricter requirements on the use of intrusive techniques; and (2) by lodging the approval authority as far as possible from the law enforcement agent who personally is involved in, and hence has the greatest stake in, and the worst perspective on, the operation. The Select Committee's proposed section "2" employs the latter principle. The authority to approve routine, unexceptional uses of the undercover technique is vested in an SAC or equivalent local official, thereby removing the decision at least one level from the field agent. Where the proposed undercover activity is more intrusive or more dangerous—where First Amendment interests are involved, for example, or where there is the possibility of harm to third parties—the proposal requires consideration and approval of the operation at FBI HQ by the Undercover Operations Review Committee, which, being a second step removed from the field, brings greater perspective and an increased objectivity to the decision.

The value of this approach is recognized by the current FBI Undercover Operations Guidelines, which properly require prior approval by the Undercover Operations Review Committee whenever a significant range of "sensitive circumstances" may be implicated by the investigation.[34] Similarly, the Select Committee proposal re-

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[34] Paragraph B of the FBI Undercover Operations Guidelines lists 12 sensitive circumstances, among them that the investigation may involve a public official, foreign government, religious or political organization, or the news media; that the investigation may involve untrue representations concerning the activities of an innocent person; that an undercover agent or informant may engage in serious criminality during the course of the operation; that an undercover operative may attend a meeting between a target and his attorney; that an undercover operative may

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quires that the delicate probable cause determination mandated by subsections 1(c) and 1(d) be made by the Undercover Operations Review Committee.

The Select Committee's proposed section "2" does not establish the procedures to be followed by law enforcement officials in making the decisions required by section "1"; the Department of Justice is in the best position to devise a realistic and workable procedural framework. This legislative approach, however, should not be understood to denigrate the seriousness of the responsibility entrusted to the Undercover Operations Review Committee and to the SACs. To be adequate, any set of procedures must ensure that all relevant information is made available to the decisionmaking authority in a timely fashion. It must guarantee that crucial information, including the facts supporting the finding of reasonable suspicion or probable cause, is memorialized, so that the efficacy of the decisionmaking process and the responsibility for given determinations can be assessed after the fact.

Nevertheless, recognizing the need for flexibility in the world of law enforcement, the Select Committee's proposed section "3" allows for a departure from established procedures when exigent circumstances make noncompliance necessary to prevent serious injury to persons or property, to bar the destruction of evidence or the escape of a suspect, or to forestall similar harm. Again, however, this is intended to provide only a narrow exception to the generally applicable requirements. Thus, the proposal requires that, when both sensitive and exigent circumstances are present, a complete application for approval must be forwarded almost immediately to the Undercover Operations Review Committee; if the Undercover Operations Review Committee concludes that the action taken in the field was not justified, both the Director and the Attorney General should be fully informed of the circumstances surrounding the operation. The Select Committee believes that these steps are essential to place responsibility for making sensitive judgments at the proper levels, while permitting an effective internal review of compliance with legislative and administrative requirements.

The recommendations outlined above should not unduly impede legitimate law enforcement efforts. The Select Committee's proposal requires no approval or review by a court or by anyone outside the Department of Justice before an undercover operation may be initiated, expanded, continued, extended, or terminated. Instead, in large part the Select Committee's proposals reflect current practice: Officials of the FBI and of the Department of Justice have testified that undercover operations typically are not initiated in the absence of a reason to believe that criminal activity is afoot. (*See, e.g.*, FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. 131–32 (1980) (statement of Philip B. Heymann); FBI Charter Act of 1979: Hearings on S. 1612 Before the

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pose as an attorney, physician, clergyman, or member of the news media; that the operation poses a significant risk of violence, or of financial loss to innocent individuals; and so on. The Select Committee believes that this is a reasonably complete list, although the citation to it in proposed section "2" is not meant to foreclose the Department of Justice from adding additional categories of sensitive circumstances.

Senate Comm. on the Judiciary, 96th Cong., 1st Sess., Pt. 1, at 109-10 (1979) (testimony of Charles F. C. Ruff and Francis M. Mullen. Jr.).) Indeed, it is difficult to see why law enforcement officials would legitimately need to use intrusive and often expensive undercover investigative techniques in the absence of articulable facts constituting evidence of criminality.

The Select Committee nevertheless strongly believes that legislation is needed to express the will of Congress that law enforcement undercover operations be firmly grounded on a factual basis and be free from arbitrariness and abuse. Nothing in current law would prevent drastic dilution of existing guideline requirements. Indeed, at least one former ranking official of the Department of Justice actually has advocated the use of undercover techniques as a preliminary investigative tool even in the absence of circumstances giving rise to a reasonable suspicion that criminal activity has occurred, is occurring, or is likely to occur. (*See* Sel. Comm. Hrg., July 29, 1982, at 136-37 (testimony of Irvin B. Nathan).) Pressures to use the undercover technique in an unregulated manner inevitably will rise as the number of such investigations increases and as the supervision of any given operation becomes correspondingly more difficult. Indeed, during Abscam the Department of Justice authorized the use of undercover techniques against any public official whose name was mentioned by any corrupt individual, no matter how obviously unreliable the information.[35] Equally as important, legislation is necessary to close major unnecessary gaps in the existing guidelines, which in at least some circumstances clearly permit the use of undercover techniques in the absence of a reasonable suspicion of criminality.

D. Explanation for the Select Committee's Rejection of a Judicial Warrant Requirement

As noted in the opening pages of this report, many informed individuals and organizations, including some of the FBI's staunchest advocates, have argued that a judicial warrant should be required before an undercover operation is initiated or an informant is used, at least in sensitive circumstances. The arguments they have presented are undeniably compelling. First, undercover operatives and informants are law enforcement weapons that as a general rule are at least as intrusive as searches and wiretaps, for which warrants are required. It therefore seems logical to impose equivalent safeguards on the use of each of these investigative techniques.

Second, in undercover operations, no less than in other cases involving attempts to obtain information about private parties, privacy interests are more likely to be given their due when crucial decisions are made by a neutral magistrate. Thus, the Supreme Court's Fourth Amendment decisions are based squarely on the proposition that "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." (*United States* v. *United States District Court*, 407 U.S. 297, 317 (1972).) FBI and Justice Department officials are, after all, professional law enforcement personnel; their primary responsibility lies in catching criminals and preventing crime. No matter how well-intentioned or sensitive to other societal interests such officials may be, their judgments inevitably will be weighted in favor of their law enforcement mission. This common sense judgment has been recognized by the Supreme Court in its interpretation of the Fourth Amendment and by Congress in the recent enactment of the Foreign Intelligence Surveillance Act.[36]

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[35] Department of Justice officials testified that this practice was necessary to avoid claims of political targeting, as demonstrated by the Department's ability to insist today that contacts were in fact pursued with every figure whose name was mentioned. (*See, e.g.*, Sel. Comm. Hrg., July 29, 1982, at 121 (testimony of Irvin B. Nathan).) In fact, however, the Department's Abscam practice permits informants and middlemen to engage in targeting of their own. (*See* pp. 68-77 *supra*.) In the Select Committee's view, a firmer safeguard against charges of political decision-making, and one far more considerate of innocent citizens and civil liberties, would be the even-handed application of consistent formal threshold requirements, with determinations and the supporting material memorialized in writing.

Despite the appeal of these arguments, however, the Select Committee is not persuaded that a warrant requirement would solve more problems than it would create. It is not at all clear that imposing a warrant requirement on the use of informants and undercover agents would be manageable. There is little nuance to conventional searches or wiretaps; those law enforcement activities either do or do not take place; and, after the search or wiretap has been undertaken, it generally is easy enough to determine whether police officials complied with the terms of any previously obtained warrant. In marked contrast, there is a wide range of possible informant-government relationships, and the evolution of any given relationship may be extremely difficult to predict. Thus, for example, it is impossible to obtain a warrant before making use of a one-time informant who comes forward to volunteer information after the fact.[37] It seems almost as difficult to see how a meaningful warrant application could be made for permission to use a part-time or occasional informant who intermittently learns of and voluntarily offers information about criminal activity.[38]

An undercover warrant requirement is impractical for other reasons, as well. The decision whether to use an informant often of necessity will be made on the spur of the moment, since—unlike the decision whether to conduct a search or to install a wiretap—the informant's willingness to provide information may not be a product of the government's initiative; rather, the cooperating individual may simply appear with an offer of useful information. In a related vein the necessity of going outside the law enforcement agency to obtain judicial approval for the use of an informant might well inhibit private parties from providing information to the authorities, for fear that their identities will be divulged. (*See* FBI Statutory Charter: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 47-48 (1978) (testimony of James Q. Wilson).) Perhaps more importantly, both the role of an informant who must regularly interact with suspects and the general course of an undercover operation are inherently less predictable than are searches or wiretaps. Thus, it often would be impossible to establish the terms and limits of an undercover warrant with sufficient clarity to make the judicial approval process meaningful. This, in turn, would make judicial supervision—and even an ultimate determination about compliance with the warrant's requirements—extraordinarily difficult.

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[36] The Foreign Intelligence Surveillance Act creates a judicial warrant requirement for national security wiretaps. 50 U.S.C. §§ 1801-1811 (Supp. III 1979.)

[37] Indeed, it is difficult to see the justification for requiring a warrant in such a situation, which is analogous to that presented when a private party searches another individual's home and provides to the police evidence that he discovers.

[38] As former Assistant Attorney General Heymann has noted:

> [T]he scope of informants' tasks covers . . . [a] wide continuum. Some, like a bartender in a mob hangout or a streetwise addict, provide information over a long period of time regarding many crimes and suspected criminals. Others, like an associate in a jury-tampering scheme, are targeted to generate information regarding one individual involved in a single crime. The wide range in the activities of informants and their relationship to the Government make it extremely difficult to get the judiciary into the process. For example, would a warrant be required to accept information volunteered by an observed narcotics seller—the seller knowing he has been observed—or is a warrant needed only when the seller has been arrested? Or, does the warrant become necessary when he has been charged, or when information has been paid for in some fashion? If the warrant would be required and would permit the addict to inform against his supplier, would a new warrant be needed if the informant then develops new information about a different supplier or about nondrug-related crimes? The range of relationships between an informant, his testimony, and the Government is very broad.

(FBI Statutory Charter: Hearings Before the Subomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess., Pt. 2, at 40 (1978) (testimony of Philip B. Heymann).)

There also are more basic institutional reasons for rejecting an undercover warrant requirement. The Select Committee has some reluctance to mandate the placement of a pre-operation judicial imprimatur on undercover operations that may later culminate in claims of entrapment or due process violations that must be judicially reviewed. Also, enacting a judicially enforceable warrant provision would surely lead to a substantial increase in litigation, court congestion, and delays in the administration of justice, because it would encourage defendants to make suppression motions not only on traditional Fourth Amendment grounds, but also on the basis of noncompliance with undercover warrant legislation.

The Select Committee emphasizes, however, that its conclusion on this point is conditional: it rests on the belief that law enforcement authorities can be expected to comply in good faith with the reasonable suspicion and probable cause requirements proposed elsewhere in this section, if those requirements are stated as the will of Congress. Accordingly, the Select Committee's position should not be read as an unconditional rejection of the warrant requirement for all time and in all circumstances. If experience under the proposed legislation were to show that federal law enforcement agencies are unable or unwilling to regulate themselves effectively, the establishment of a judicially enforceable warrant mechanism, at least in limited and precisely defined circumstances, might well be wise. For the moment, however, it is the Select Committee's conclusion that the drawbacks of a warrant requirement outweigh the advantages.

IV. A Recommendation for Indemnification Legislation

The Congress, through its appropriate committees, should consider legislation to compensate from the United States Treasury persons (other than persons cooperating with or employed by the Department of Justice in connection with the undercover operation) injured in their person or property as a result of a Department of Justice undercover operation, under the following conditions and circumstances:

1. the injury was proximately caused by conduct, of a federal employee or of any other person acting at the direction of or with the prior acquiescence of federal law enforcement authorities, that violated a federal or state criminal statute during the course of and in furtherance of a Department of Justice undercover operation;

2. the injury was proximately caused by conduct, of any federal employee or of any informant or other cooperating private individual, that violated a federal or state criminal statute and that the person who engaged in such conduct was enabled to commit by his participation in an undercover operation; or

3. the injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation; provided, however, that an action should not lie under this legislation for injury caused by operational or management decisions that relate to the conduct of the undercover operation.

Although undercover operations often yield substantial benefits, undercover investigative techniques also pose unique dangers. The Select Committee's other recommendations—in particular, those directed at improving the supervision of operations and at facilitating enhanced Congressional oversight—may reduce those risks, but the peculiar characteristics of undercover investigations make it inevitable that injury to innocent citizens occasionally will occur. The immediately preceding sections of this report, which deal with entrapment and the initiation of undercover operations, therefore offer proposals aimed in part at preventing injuries to innocent subjects of undercover operations and in part at providing remedies for such injuries when they occur. This section, on the other hand, addresses the dangers that undercover techniques pose to the public at large.[39]

The Select Committee's conclusion, spelled out more fully below, is that Congress should create a mechanism that can be used, under the appropriate specified circumstances, to indemnify individuals who are injured during the course of an undercover operation. Two overriding considerations would be served by such legislation. First, it seems inequitable to make innocent citizens who fortuitously happen to be in the wrong place at the wrong time bear the foreseeable costs of law enforcement efforts. Second, there is likely to be considerable public resentment of government, as well as significant opposition to the use of undercover law enforcement efforts, if law enforcement officials are permitted to inflict substantial harm on innocent individuals who have no legal recourse.

A. The Nature of the Problem

The magnitude of the problem in this area can be gleaned from recent litigation. As of November 4, 1982, the FBI alone had been subjected to 27 law suits arising out of undercover operations. The plaintiffs in those proceedings sought aggregate damages running into the hundreds of millions of dollars. (*See* Letter from FBI Director William H. Webster to Senator Charles McC. Mathias, Jr., at 2–7 (Nov. 4, 1982).) This is not to suggest that any substantial number of those claims are valid, of course, but this body of litigation nonetheless provides an idea of the number of individuals who believe themselves to have been aggrieved by undercover law enforcement efforts. It also reveals some of the issues that may arise in this area in the future.

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[39] These latter types of injuries may also be inflicted upon innocent targets, of course, and a target who is so injured would have an action under the Select Committee's other proposals.

1. Types of injury

Injuries caused to the public by undercover operations fall into three general categories.[40] The first and seemingly most common type of harm involves independent fraudulent or other criminal activity conducted outside the operation by an informant who uses the operation's scenario in a manner unrelated to the operation's law enforcement purposes. Abscam's Melvin Weinberg, Palmscam's Joseph Meltzer, and Frontload's Norman Howard caused harm in this manner.

Undercover operations, of course, often rely upon professional confidence men whose ability to penetrate the criminal community may be crucial to the investigation's success. Their participation in an undercover enterprise may, however, present such individuals with an irresistible, government-created cover for use in crimes against innocent citizens. That apparently was the case in Abscam, in which one-time FBI informant Meltzer used his knowledge of the mechanics of the operation to defraud victims. The same phenomenon is illustrated more dramatically by Operation Frontload, in which informant Howard took advantage of his government-provided cover to issue millions of dollars worth of fraudulent construction performance bonds, while collecting hundreds of thousands of dollars in premiums from unsuspecting clients.

The second category of public injury is that resulting from criminal acts committed by agents or informants in furtherance of the operation's legitimate aims. The existing Guidelines for FBI Undercover Operations expressly contemplate the authorization of agents to engage in harmful criminal activity (*see* Attorney General's Guidelines on FBI Undercover Operations ¶ B(c) (Jan. 1981)), and the Select Committee's proposals do not foreclose that possibility. This is because there may be circumstances in which destructive behavior by law enforcement agents would be justified; if, for example, law enforcement authorities are attempting to penetrate an extortion-protection ring that has caused millions of dollars worth of property damage, an agent might be entirely justified in smashing windows or engaging in other minor property crime, if those actions are necessary to preserve his cover. Similarly, there have been allegations that in the notorious Gary Rowe case an FBI informant engaged in violent activity during the course of his federal employment. (*See* FBI Charter Act of 1979, Hearings on S. 1612 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess., Pt. 2, at 8-11 (1979).)

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[40] There is a fourth category of possible harm: harm inflicted on private parties who cooperate with federal authorities in creating a cover for undercover activities; for example, the Chase Manhattan Bank and the New Hampshire Insurance Company, which provided covers in Abscam and Frontload, respectively, were sued by victims of Joseph Meltzer's and Norman Howard's illegal activities. The Select Committee has addressed this problem elsewhere by recommending that the Department of Justice be empowered to execute indemnification agreements with cooperating individuals. (*See* Legislative Recommendation A4(e), p. 26 *supra*. *See also* pp. 359–60 *supra*.)

Of a different nature are allegations concerning the FBI's recent operation Recoupe, an investigation aimed at penetrating stolen car rings, in which an FBI front apparently sold wrecked cars to "retaggers," who transferred the automobile serial numbers to stolen vehicles. Plaintiffs in suits against the FBI growing out of the operation have alleged that law enforcement agents engaged in "racketeering" by selling the stolen vehicles to unwitting middlemen, who in turn sold the cars to innocent buyers. (*See* Taylor, FBI's Use of Con Men to Catch Other Crooks Occasionally Backfires, *Wall Street Journal,* Oct. 7, 1982, at 16, cols. 2-3.)

Finally, there is a limitless variety of situations that can be grouped because the harm in each was, in a sense, caused by the very existence of the operation. A comprehensive list of such situations cannot be compiled, because the nature of the various injuries is as varied as are the operations themselves. It is worth noting several examples that may be typical, however, to give some sense of the types of difficulties that can be expected. First, it is possible that, to avoid destruction of the operation's cover, goods recovered during the course of the undercover operation will not be promptly returned to the owner and that the owner, not knowing that his property has been recovered, will make unnecessary expenditures.[41] Conversely, an innocent citizen may learn of the operation's scenario through legitimate means and rely on his belief in the reality of the scenario while making independent business judgments. In Abscam, for example, a legitimate investor might have been led by one of the targets to believe that Arab sheiks were depositing hundreds of millions of dollars in the Chase Manhattan Bank and might have purchased Chase Manhattan stock in reliance on that information. A third example is more direct: The existence of an undercover operation might stimulate illegal activity, at least in the short run, resulting in an innocent person's becoming the victim of a crime that would not have occurred but for the operation.[42] Finally, even apart from the law enforcement aspects of an operation, competition from a government proprietary may harm legitimate businesses.

2. Existing law

While many of the types of harm described above have, at least allegedly, occurred, it is not at all clear which, if any, can be remedied under existing law. There is no existing statutory indemnification scheme explicitly relating to undercover operations. In the absence of such legislation, plaintiffs in suits against the FBI have relied principally on the Federal Tort Claims Act of 1946, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.), which provides an action against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (28 U.S.C. § 1346(b) (1976).)

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[41] Allegations to this effect were made following Operation Lobster. In 1979 Springmeier Shipping Company of St. Louis complained to the FBI that one of its stolen trucks had been recovered early in the Lobster operation, but had not been returned for a year while the operation was underway. Springmeier maintained that this failure promptly to return the vehicle cost the company over $60,000 in insurance premium adjustments, as well as its $5,000 deductible. The FBI declined to offer reimbursement.

[42] For example, fencing operations may stimulate property crime by providing a new market for stolen goods. (*See* FBI Undercover Guidelines: Oversight Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 40-41 (1981) (testimony of Gary T. Marx).)

It is not clear, however, that the harms described above are actionable under the Tort Claims Act. There appears to be no claim for relief against the government for independent criminal activities conducted by informants unless, as apparently was the case in Frontload, federal agents were demonstrably negligent in their supervision of the informant. Even if government employees were aware of the informant's criminal activities and, to avoid ruining the operation's cover, intentionally chose not to stop them (as allegedly occurred with respect to Meltzer), the government may be shielded from liability by the Tort Claims Act's exception barring any action "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (28 U.S.C. § 2680(a) (1976).) For the same reason, the Tort Claims Act may not reach intentional criminal acts committed in furtherance of the law enforcement operation, whether undertaken by an informant or by a government employee.

Plaintiffs in cases arising out of undercover operations also have asserted constitutional claims of varying degrees of persuasiveness. While claims alleging violations of the takings clause or due process clause of the fifth amendment to the Constitution may be sound, the courts have not yet resolved those issues, and it is far from clear that even an individual who unquestionably has been wronged will be able to recover. In any event, insofar as such claims cannot be brought under the Tort Claims Act, the government has not waived its sovereign immunity as to any of them.

B. Proposed Legislation

In light of the dangers posed by undercover operations and the apparent inadequacy of current remedies, the Select Committee recommends creating a cause of action explicitly designed to compensate innocent citizens for some of the injuries arising out of undercover operations. Such legislation will provide for redress for victims in appropriate limited circumstances, no matter how the courts interpret existing law. In drafting its proposals the Select Committee has not attempted to modify the scope of existing remedial statutes; instead, it has suggested a new, narrowly focused remedial scheme that will not adversely affect law enforcement operations and will assure a remedy for most of the individuals who suffer harms clearly traceable to the use of undercover techniques. This legislative course is not unusual: Congress has not hesitated in the past to create remedies for persons harmed by particular types of law enforcement conduct. (*See, e.g.*, Privacy Protection Act of 1980, § 106, Pub. L. No. 96-440, 94 Stat. 1879-83 (codified at 42

U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7, 2000aa-11, 2000aa-12) (Supp. IV 1980).)

Section "1" of the Select Committee's proposal would create a cause of action for harm directly resulting from illegal activity undertaken by agents or by informants acting legitimately to further an undercover operation's law enforcement purposes. Because harms of that nature are one of the direct, foreseeable costs of law enforcement, and because the benefits of crime prevention are enjoyed by the general public, it is arbitrary and inequitable to maintain a system that imposes those costs on a small number of randomly affected citizens. Less tangibly, but equally importantly, public disrespect and antagonism for law enforcement agencies is likely to be generated if those agencies are allowed, by themselves violating the law, to harm innocent individuals. That disrespect and antagonism can only be compounded if injured innocent citizens are not provided with an effective remedy. Further, to allow the government knowingly to make particular citizens or groups of citizens the victims of crime is to grant a power that is subject to abuse and selective use, a danger that may be ameliorated by legislation along the lines proposed in section "1."

The Select Committee's second proposal, section "2." would create a claim for relief for individuals harmed by the independent illegal activity of an informant or government employee[43] who was enabled to commit his crime by virtue of his participation in an undercover operation. This proposal is not aimed at all illegal conduct engaged in during the course of an investigation; the proposed provision applies only when the operation in some sense provided the means by which the criminal act was committed. Examples of this sort of activity are the actions of Joseph Meltzer and Norman Howard, whose knowledge about the mechanics of undercover enterprises enabled them to defraud innocent parties. The proposal is not limited to fraudulent conduct, however, and would apply to other types of criminal activity that an informant could not have committed had he not been a participant in an undercover operation.

Several factors support the imposition of liability in the circumstances described above. Again, it is equitable to reimburse innocent victims of the criminal conduct that, unfortunately, appears inevitably to accompany and to be made possible by at least some number of undercover operations. Imposing liability in such circumstances might also have the salutary effect of encouraging federal authorities to supervise more effectively the activities of informants, while giving law enforcement personnel an additional reason to remain constantly aware of the dangers presented by the use of undercover techniques. Moreover, FBI officials have expressly recognized that the use of professional criminals in law enforcement undercover activities poses substantial risks of harm to innocent citizens; if the government is to create an environment in which these harms might occur, it should, like owners and managers of dangerous enterprises at common law, bear the costs that materialize out of those risks.

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[43] Fortunately, there have not been allegations of such impropriety on the part of government agents. Federal employees will have the opportunity to commit offenses of that type, however, and failure to cover them in this provision would create an unnecessary gap.

The Select Committee's final indemnification proposal would create government liability when the plaintiff's injury was proximately caused by negligence on the part of federal employees in the supervision or exercise of control over the undercover operation. This proposal aims at negligence in what might be termed the procedural aspects of the operation—the supervision and implementation of the investigation. To a certain extent this overlaps with proposed section "2": Norman Howard's actions in Frontload, for example, would fall under both provisions.[44] Proposed section "3," however, reaches further: If, for example, federal agents became, or should have become, aware that someone who was not a government informant had discovered an undercover scenario and was using it to defraud innocent third parties, but the federal agents unreasonably failed even to investigate the possibility of taking action to protect those innocent parties, a claim would arise under the Select Committee's proposal.

The proviso to proposed section "3"—that an action should not lie for tactical decisions relating to the conduct of the operation—is intended to make clear that courts should not be required to judge the reasonableness of considered law enforcement decisions that were taken to advance the legitimate purposes of the investigation. Thus, questions about whether a given operation is too dangerous and whether the benefits of a given action outweigh the risks should not be subjected to a judicial cost-benefit analysis after the fact.

Concededly, this results in something of an anomaly: Negligence in the supervision of an operation will lead to federal liability, while a conscious law enforcement decision to proceed despite considerable risks to the public will not. But this arrangement is intended to achieve a particular end. The Select Committee believes that it would be unwise to subject to scrutiny by the courts the implicit and explicit cost-benefit determinations that must be made during the course of any law enforcement operation. Such a scheme would discourage law enforcement initiative, often would lead to entirely speculative verdicts, and occasionally would require the disclosure of confidential law enforcement information and materials. Proposed section "3" is intended to leave discretionary law enforcement decisions in the hands of law enforcement authorities, as is generally the case with respect to conventional law enforcement tactics. But, because of the peculiar dangers of undercover operations, proposed section "3" is designed to encourage authorities to exercise careful supervision over such operations. The aim is to ensure that cost-benefit decisions made by the authorities are well-informed, intentional, and properly implemented.

The remedial scheme spelled out above will not provide indemnification for everyone who suffers harm resulting from the existence of an undercover operation. Practical reasons require some limits. It is nearly impossible to prove, for example, that a given crime suffered by an innocent party was inspired by a government sting operation or that a given business decision was grounded on the businessman's belief in the undercover scenario.[45] Thus, for example, it may well be that when an undercover fencing operation is established, more thefts occur in the immediate vicinity of the front than would otherwise have occurred, because the market for stolen goods is larger; but no one victim whose property has been stolen during the operation will be able to prove that his particular property would not have been stolen in the absence of the front.

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[44] Double recovery in such circumstances is not envisioned.

In contrast, the narrow circumstances delineated in sections "1" and "2" provide particularly attractive cases for indemnification. The nature of the harm in such cases is clearly and demonstrably traceable to the undercover operation. Such harm is a plainly foreseeable result of the use of undercover techniques; and, in a sense, injuries of that type are particularly offensive, because the harm they inflict was intentionally brought about by someone working for the government.

In cases covered by proposed sections "1" and "2," then, it seems appropriate to provide a cause of action regardless of the propriety of the law enforcement decisions involved and notwithstanding the unavoidability of the harm in a given case. This is not true of other types of injuries stemming from undercover operations, however, and the Select Committee has concluded that it would be wiser not to create relief for such injuries than it would be to allow litigation over the propriety of given law enforcement decisions.

V. Explanation for the Select Committee's Rejection of Proposals To Make Department of Justice Guidelines Judicially Enforceable

Another legislative proposal considered by the Select Committee was one that would make the Department of Justice guidelines judicially enforceable. Adopting this proposal would in practice mean that a federal law enforcement agency's failure to comply with a guideline requirement would result in the judicial voiding of any conviction obtained through the use of a flawed undercover operation. While the argument in support of this proposal is cogent, the Select Committee is unconvinced that it warrants legislation.

Under existing law it is clear that noncompliance with internal law-enforcement guidelines is not a valid defense to a criminal charge. The Supreme Court so held, in reviewing a conviction obtained through an Internal Revenue Service undercover operation, in *Caceres* v. *United States,* 440 U.S. 741 (1979), where the Justices concluded that technical violations of guideline requirements should not lead to the overturning of a conviction on either due process or statutory grounds.

The proponents of judicially enforceable guidelines have advanced a simple and appealing argument against *Caceres:* They have argued that police will take guidelines seriously only if failure to comply will result in the loss of a conviction. In the absence of judicial oversight, the argument continues, there will be an inevitable tendency for law enforcement authorities to cut corners, and the guidelines will be complied with only when compliance is convenient. (*See* FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 30 (1981) (testimony of Louis Seidman); *id.* at 56–57 (statement of Paul Chevigny).)

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[45] Indeed, the need for recovery becomes less compelling as the government's involvement in the injury becomes less direct. In the Lobster situation alluded to above, for example, the Springmeier company's claims are not particularly compelling; had it not been for the law enforcement operation challenged by the company, the shipper's losses would have been total.

This line of reasoning is similar to that advanced in favor of a judicial warrant requirement, and the Select Committee's reaction here is similar to its conclusion in the warrant context. (*See* pages 387–89 *supra.*) This reluctance to recommend legislation is based on several considerations. Perhaps most importantly, voiding a conviction can be an overly severe sanction for what may be a technical violation of guideline requirements. It is one thing to exclude evidence for failure to comply with search and seizure requirements constitutionally imposed by the Fourth Amendment, but it is quite another thing to void a conviction because, for example, federal agents failed to obtain approval from the Undercover Operations Review Committee for an operation that cost more than $20,000. (*See* Attorney General's Guidelines on FBI Undercover Operations ¶ A(g) (Jan. 1981).) Conversely, fear of running afoul of the judiciary may lead Department of Justice officials to dilute guideline requirements in an attempt to minimize the risk of violations. To this extent, making guidelines judicially enforceable may adversely affect the maintenance of effective control over law enforcement efforts and lead to demands to replace guidelines with detailed statutory specifications for law enforcement techniques.

Also, even if only the most significant guidelines are made enforceable, such action inevitably will lead to a substantial amount of litigation. That in itself is highly undesirable, especially in view of the already considerable delays in the criminal justice system. Further, such litigation will probably result in the undesirable repeated disclosure of sensitive law enforcement data.

Consistent noncompliance with guideline requirements, if it occurs, might necessitate a reassessment of the Select Committee's conclusion. For the moment, however, the Select Committee finds that it would be inadvisable to disturb *Caceres.*

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STATEMENT OF HON. DON EDWARDS, U.S. HOUSE OF REPRESENTATIVES, CHAIRMAN, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

Mr. EDWARDS. It is a pleasure being here and I bring you greetings from your colleagues, former colleagues of the House Judiciary Committee, where you served so valuably for such a long time.

I would like my statement to be made a part of the record.

Senator MATHIAS. Without objection, Mr. Edwards' statement will be included in full in the record.

Mr. EDWARDS. Mr. Chairman, I listened with interest to your opening statement and certainly agree with what you said. The subcommittee that I chair in the House, which has jurisdiction over the domestic operations of the FBI, started more than 4 years ago to conduct hearings and investigations on this rather new technique that the Bureau began to use—undercover activities.

We had many, many days of hearings and many, many witnesses for that period of time. Then we issued this report. The report is in great detail about one particular operation. We went into one particular undercover operation in great detail both with the field office and at the headquarters in Washington.

Our special counsel, Janice Cooper who is here, was the lawyer who went to the Bureau and examined Operation Corkscrew. Corkscrew was an undercover operation in the city of Cleveland from 1978 to 1982 and had to do with alleged case fixing in the municipal court in Cleveland.

Well, Mr. Chairman, what did we find and conclude? As in your report, we found that the heart of these undercover operations is the middleman, an individual, usually a criminal, and generally unaware that he or she is working for the FBI. The middleman acts as a go-between between the FBI and the targets.

And the theory is that the middleman selects the target, not the FBI. So that the FBI does not improperly target. Well, we found, as you found, that the middleman can be manipulated by the FBI agents to fulfill the agents' work.

In Corkscrew, for example, the FBI undercover agent offered the middleman large sums of money to set up meetings with judges who were supposed to be fixing cases. But the actual evidence, Mr. Chairman, was that the case fixing was carried on by the police, by lawyers and by low level court employees. Yet in Corkscrew, these leads were not followed because the FBI had their eye on the judges. The middlemen were steered by the FBI to the judges.[1]

Great damage was done to the municipal court in Cleveland even though there was no real credible evidence against these judges and none was developed. The targeting failed.

Now, Mr. Chairman, the Bureau claims that the allegations of these middlemen invariably must be corroborated by strong evidence, and yet in our investigation, we found that too often this corroboration was wishful thinking.

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[1] See, "FBI Undercover Operations," Ser. No. 11, and "Executive Summary on Report on FBI Undercover Operations," Ser. No. 12, reports of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Congress. (Available in the subcommittee files.)

In Corkscrew, again, the corroboration of the case fixing consisted of taped conversations and court records. The FBI headquarters here in Washington and the undercover review committee were assured of the existence and reliability of this corraboration.

Yet in reviewing the tapes we found that they were totally ambiguous if not innocuous. We also found that some allegedly corroborating court records were partially forged by the middlemen and otherwise inconclusive.

Another major myth is that if innocent targets are approached, justice is assured because an honest man or woman can merely reject the criminal offer and walk away. Now, unfortunately, we found that too often the criminal proposition is intentionally phrased in ambiguous, confused language, and there is no way that the target could fully appreciate the meaning of the transaction.

In my prepared testimony, I have a rather lengthy example of a taped conversation between a Cleveland municipal judge and the middleman. That conversation was alleged to be proof of the admission of the acceptance of a bribe. I commend the members of your committee's attention to this tape. It is really shocking that this tape came close to being the basis for an indictment, because it is certainly a very inclusive bit of evidence.

The final myth, Mr. Chairman, is that the problems and the mistakes in these undercover activities are a thing of the past, that they do not happen any more and that the control and supervision is there. Well, most of the operations that we reviewed, and we reviewed more than Corkscrew, were from 1978 to 1982. And although I do not like to comment on an ongoing case, just last week in the New York Times, you read about the DeLorean case where there was a teletype to the FBI headquarters from an undercover agent asking for $17,860 for the undercover operation, and the FBI agent said to headquarters that this DeLorean was involved in large-scale narcotics transactions and laundering of large amounts of illegal money.

Well, the FBI witness acknowledged that this was not true, that it was true of a person by the name of Hetrick but not of DeLorean. The defense attorney asked why did you write to the headquarters like that. Why did you do it? And the agent said, "I thought it sounded pretty good." This was the FBI undercover agent.

This testimony suggests that even today headquarters and the undercover review committee are approving exagerated evidence. Whether Mr. DeLorean is guilty or innocent is for the jury to decide. The only question we have is whether these safeguards are working if the FBI headquarters and the undercover review committee are doing their job or if more effective controls should be enacted such as those suggested in your bill, S. 804.

Last, our report documented a wide variety of personal, financial, institutional, and societal damage that has resulted in the few short years since this new technique of undercover activities became the vogue.

Mr. Chairman, a lot of people have been hurt. Many of these injuries resulted from poor supervision and could and should have been prevented.

I believe that your S. 804 is sound legislation, but the subcommittee that I chair went in our recommendations one step further than you did, because we found that those with a stake in a case cannot seem to make objectively the threshold decision. Accordingly, we recommend that a neutral party make the decision. We recommend the ancient and proven procedure be required of a judicial warrant, the procedure that's used so successfully in wiretaps and is provided for in the Constitution and the fourth amendment of our Constitution for a search warrant.

Regarding the Undercover Review Committee, we learned that too often it has failed to monitor effectively the undercover operation. We believe, as you apparently do, that the Undercover Review Committee would be more effective if its membership were diversified. We go further and recommend that the expertise of the Civil and Civil Rights Division of the Justice Department be added to the committee.

In your bill you also address the regulation of the conduct of agents and informants. Your bill seems to imply that if high officials approve the operation, the undercover operation will proceed with due regard for people's rights.

While this might be very true sometimes, our review reflects that where the stakes are high, the opposite can occur, when stakes are very high. That is, the high-ranking officials at the FBI headquarters are inclined to defer to the field and permit inappropriate developments in an operation where the targets are perceived to be particularly important or newsworthy.

So our subcommittee recommended that Congress should set very clear limits on permissible conduct to decide, for example, whether and when it is all right to impersonate priests or reporters, to commit felonies, or to perjure oneselves. We felt that both society and the bureau needs this kind of protection, and you covered that very well in your report.

Finally, we concur that the law must be amended to provide compensation for innocent bystanders who have been hurt. We have serious doubts about the adequacy of the existing law and the attitude of litigators in the Justice Department in these cases. So far it does not give us much confidence that justice is being done.

Mr. Chairman, except for the warrant requirement, our subcommittee was unanimous in our recommendations. There is agreement that the problem is real and legislation is needed. I commend you and your colleagues for taking the lead in this respect to introduce the S. 804, and I hope that it will go a long way. Thank you.

Senator MATHIAS. Well, thank you very much, Mr. Edwards. I am very happy to have your recommendations and your approval of the general provisions of S. 804. There was a public perception that I think was unwarranted that the two investigations in each body of the Congress took separate routes, but I think your testimony makes it clear that the agreements were much greater than the disagreements.

You mentioned the question of requirement of a warrant, and I believe that was the principal difference that you had within your own committee and with respect to your own report, is that not so?

Mr. EDWARDS. That is correct. We made four recommendations and there was unanimous agreement on three. Three of the members dissented on the suggestion for a warrant.

Senator MATHIAS. But in other respects your committee was as united as our committee was.

Mr. EDWARDS. That is correct.

Senator MATHIAS. I thought it might be useful just to make sure that the record is full and complete to ask the ranking minority member, Mr. Sensenbrenner, to give us his views for the record.

Mr. EDWARDS. A very good idea.

Senator MATHIAS. But there is no doubt in your mind, I assume, that there is a consensus within the Subcommittee on Civil and Constitutional Rights with respect to the need for legislation on the subject of Federal undercover operations.

Mr. EDWARDS. That is correct. Of the four recommendations we made, three were unanimous.

Senator MATHIAS. Could you discuss briefly the subcommittee's recommendation for a warrant requirement? I am thinking specifically about how broad an area the warrant should cover. Should it be a kind of general authorization for undercover operations, targeting a particular kind of crime in a particular area and based on certain facts that give rise to reasonable suspicion?

Or would you think it should be something narrower? Should it apply only to a proposal to offer a particular individual an opportunity to commit a specific illegal act under circumstances that would be detailed with particularity in the warrant application?

Mr. EDWARDS. Mr. Chairman, we think that the legislation requiring the warrant should be written with great care and narrowly and only after hearings. We think that the legislation should enumerate the crimes or types of operations that are included; the application for the warrant should have full details.

We think the legislation should require the criminal standard, and the criminal standard should be described. There should be a provision that ordinary methods of investigation are not enough.

There should be a time limit, and after the time limit is up, and if they wanted an extension, the law should provide that they must go back to the same judge. There should be certain officials in the Justice Department designated who could approval the warrant application.

Senator MATHIAS. The warrant concept, of course, has been subjected to two criticisms. One, that the judiciary is already overburdened and that this might involve them in a supervisory role over law enforcement investigations.

The other criticism is that it would retard police reaction to developing events, that the police would be unable to move as fast as circumstances might require. Do you have any feeling about these two criticisms?

Mr. EDWARDS. I can recall, and I'm sure you can, Mr. Chairman, that we went through the same arguments when legislation was proposed to require a warrant in wiretaps, the same objections were raised. I think the law providing for warrants and wiretaps is working very well, even though all of us I'm sure have real problems with wiretaps at all.

Also, I think any law requiring warrants and undercover activities is down the road apiece. This is a very controversial area, and certainly the easier reforms will be enacted before that particular requirement is enacted into law.

Senator **Mathias**. Now, in your report, you talk about the costs of undercover operations, various kinds of costs. But did you attempt to balance in your own minds the costs against the benefits, either the economic benefits or the less tangible benefits that result from the use of undercover operations?

Mr. **Edwards**. Mr. Chairman, that is a very difficult subject, and we do, from time to time, call upon the General Accounting Office to examine the claims of recoveries, fines, money saved, and so forth.

It is really very difficult. As a result of some of the undercover operations, there are outstanding lawsuits with claims against the Government of something up to $200 million. So we do not know what is going to happen with those particular lawsuits.

However, the Bureau, the Department of Justice has advised us that there also have been savings, and recoveries and fines of several hundred million dollars. None of that has been audited as yet.

Senator **Mathias**. Thank you very much, Mr. Edwards.

[The prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF HON. DON EDWARDS

I am extremely honored to appear today before the Subcommittee on Criminal Law to discuss S. 804, the Undercover Operations Act. I share your belief that the time has come for legislation which would control this effective yet dangerous and intrusive technique.

As Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, which oversees the Federal Bureau of Investigation, I have participated in over four years of intense study of undercover operations, particularly as utilized by the FBI. The result of our labors is a report that the Subcommittee issued on May 1. With your permission, I would ask that the Report be made a part of the record.

In many respects, the work of my Subcommittee and our factual and legislative conclusions are strikingly similar to those of the Senate Select Committee to Study Undercover Activities of Components of the Department of Justice which you headed, Mr. Chairman. I believe this consistency provides sound evidence that we are on the right track, both in identifying the problems and suggesting ways to prevent or alleviate those risks. To a very large extent, therefore, I am here in support of S. 804.

Let me begin by describing what the Subcommittee on Civil and Constitutional Rights did. First, we heard from dozens of witnesses: legal and linguistic scholars, defense attorneys, prosecutors, victims, FBI and Department of Justice policy makers, and others, who described both theoretical issues and the real world of actual undercover operations. Second, we reviewed the entire FBI Headquarters and field file in one major case, code-named Operation Corkscrew -a 1978-82 probe of alleged case-fixing in the Municipal Court of Cleveland, Ohio. Like your review of Operation Abscam, our study of the thousands of documents of Operation Corkscrew was extremely arduous, but also extremely instructive. Policy statements, published guidelines, and testimony by Bureau and Department of Justice spokesmen all have their place, but there is no better way to determine whether those principles are being implemented than to look at the contemporaneous record of particular operations.

I believe the major contribution of the Subcommittee's work lies in two areas - first, in debunking some of the myths and assumptions about undercover operations; and second, in revealing the extent and nature of the harm and danger to individuals and society that have resulted from misuse of this technique.

The first myth concerns the use of so-called "middleman", those indivudals who, unaware they are working with the FBI, act as go-betweens with the ultimate targets of the operation. It is assumed that by relying on "middlemen" to select subjects, the FBI avoids improper targeting. It is also assumed that the selections of these middlemen are reliable because the Bureau knows that the middlemen themselves are involved in the criminal activity under investigation.

Yet, we found, as I believe you did in the Select Committee's review of Abscam, that this is not always the case. First, "middlemen" can, and have been, manipulated to fulfill the investigator's hunches as to who or what groups should be targeted or steered away from some group in whom the investigators are not interested.

For example, in Operation Corkscrew, the undercover agent offered the middleman (a bailiff in the Cleveland court) a relatively huge amount of money to set up meetings solely with judges who were supposedly fixing cases. Previously gathered evidence, however, pointed to the conclusion that case fixing was accomplished solely by police, attorneys, and low-level court employees. Yet, once the operation was begun, leads pointing to those suspects were left unexplored. Indeed, the FBI went so far as to publicly declare that the police were not under suspicion, nothwithstanding the fact that the initial impetus for the investigation was an incident involving the police department.

An example of steering the middleman toward a particular individual target occurred in Operation Colcor. In that case, the undercover agent brought up the name of a prominent politician 34 times in conversations with the middleman and eventually succeeded in enticing that middleman to set up a meeting with the politician. Not only did the Bureau lack reasonable suspicion of that politician's criminal propensities, but they had virtually no knowledge of the middleman's involvment in on-going criminal activities.

As you know, in both Corkscrew and Colcor, this kind of target selection proved to be unproductive. No credible evidence against the judges was acquired and the Colcor subject was acquitted.

The second myth is that the claims of these middlemen are invariably supported by some reasonable amount of corroboration either as to the middleman's veracity or the target's complicity. While this may be true in some operations, it has also been the case that this corroboration has consisted of mere wishful thinking or untested assumptions.

In Corkscrew, corroboration of judicial case-fixing rested upon taped conversations and court records. FBI Headquarters and the Undercover Review Committee were assured of the existence and reliability of this corroboration. Yet, the contemporaneous record shows that (1) the tapes were totally ambiguous, if not innocuous. Not only were the words ambiguous, but so was the "structure" of the encounter. There was nothing *per se* suspicious; (2) one set of court documents appears to have been forged by the corrupt middleman, and the other document check was viewed by the field and "inconclusive" at best.

The third major myth is that even if innocent targets are approached, justice is assured because the honest man can merely reject a criminal offer and walk away. Unfortunately, we found that, too often, the criminal propsition is intentionally phrased in a confused or ambiguous manner. In these situations, it is profoundly unfair to expect the target to fully appreciate the meaning of the transaction. Consider the following actual example from one of the Corkscrew tapes, a conversation involving the bailiff/middleman, a judge, and the undercover agent who had just been introduced by the bailiff as his friend. The purpose of the conversation was to confirm that the judge had received a bribe (via the bailiff) for fixing a case involving a particular defendant.

> Agent. Oh, I wanted to thank you for,uh
> Judge. For what?
> Agent. For,uh (name of defendant)...
> Judge. I don't remember. From last week, I'll tell you I can
> look at my sheets and tell you what I did, uh let me see.
> You know me, if the guy has got a winner, he's got a winner,
> if he's got a loser, he's got a loser...Last week...This
> is last week's sheet. (Flipping pages)..

> Judge. Last week what? There is last week's sheets. No (misstates defendant's name) There's all the names for last week. You sure it was last week? Maybe the week before?
> Agent. Yeah
> Bailiff. Yeah
> Agent. Whatever
> Judge. Who was the week before?
> Agent. Oh
> Judge. Hell, I don't remember, hey, you know, I'll tell you, I hear a case, I go home and that's it. I forget about it (checks docket for two weeks earlier) Is it on there?
> Bailiff. No, it's not on the docket.
> Judge. Well what are you talking about? The guy (mispronounces defendant's name)
> Bailiff. Yeah
> Judge. I don't even remember the name...
> Bailiff. I knew
> Judge. ...I don't remember faces, names, to me it's x or y... (discusses another case and leaves)

This constitutes the entire relevant portion of the conversation.

While this example is extreme, it is not unique. Moreover, it is important to remember that the investigators were convinced of this target's guilt, and came within weeks of indicting him, based on this conversation, the claims of the middleman, and the false documents I mentioned earlier.

The final myth is that the problems and mistakes described in the Subcommittee's report are a thing of the past, that control and supervision have improved. First, let me note that many of the operations we reviewed were recent ones. The agent in Corkscrew went undercover in early 1980, at precisely the same time Assistant Attorney General Heymann was reassuring my Subcommittee and the American people that safeguards were in place that would prevent reliance on lying middlemen, ambiguous offers, exorbitant bribes, and ensure close supervision. Likewise, Operation Colcor was conducted in 1981-1982, after the formal undercover guidelines were firmly in place. Just last week the New York Times reported that the following was elicited in testimony at the DeLorean trial:

> Mr. Tisa [the FBI undercover agent] sent the teletype to bureau headquarters in Washington on Sept. 10, 1982, seeking authority and $17,860 for an undercover operation involving Mr. DeLorean and William Morgan Hetrick, a drug smuggler...
> Mr. Weitzman [the defense attorney] suggested to Mr. Tisa that he had overdrawn his case to headquarters in his eagerness to head a major investigation. Mr. Tisa said it was his biggest drug case.
> The teletype described the operation as "dealing with two subjects involved in large scale narcotics transactions, in addition to the laundering investment of large amounts of illegally received income.

> Under questioning by Mr. Weitzman, Mr. Tisa acknowledged that his description was not true at that time of Mr. DeLorean, though it was true of Mr. Hetrick.
> "So why did you write it like that?" Mr. Weitzman asked.
> "I thought it sounded pretty good," Mr. Tisa replied.

What this testimony suggests is that, as with Corkscrew, and other investigations, the field agent may not have had enough evidence to support a reasonable suspicion of wrongdoing, and second, that FBI Headquarters and the Undercover Review Committee, in approving the operation, accepted his exaggerated version of the evidence. Now it may well be that eventually the FBI acquired evidence of Mr. DeLorean's involvement. That is for the jury to decide. I am talking not about guilt or innocence, but about whether the first safeguard - the threshhold standard - is being applied in a meaningful way by the field and whether headquarters has an effective system of supervision. The results of our investigation indicate that the answer is no.

The lesson the Subcommittee learned from its review of Corkscrew is that those close to the investigation can be blind to its shortcomings, and this includes the prosecutor's office and those in Washington. When the stakes are high, it becomes harder and harder to ask tough questions. No one gets commendations for preventing or terminating a big case.

Light must be shed on how undercover operations actually are initiated and run because I believe that if the American people understand that they themselves, their families, and other law-abiding people can be targeted by a middleman who has incentives to lie, and can be subjected to an ambiguous "test", they will demand effective controls. I believe they expect this not only because of a conviction that law-abiding people ought to be left alone, but because the dangers associated with this technique are particularly great.

The Subcommittee Report's second contribution pertains to the extent of the risks that these operations pose. We documented a wide variety of personal, financial, institutional, and societal damage that has resulted in the few short years since the undercover technique has come into vogue. Ruined businesses, shattered health, huge bills for the taxpayers, distrust of public institutions fueled by unfounded accusations; these are some of the costs we have uncovered across the nation.

Some of the injuries we discovered were the result of poor supervision and could, and should, have been prevented. Others may be part of the price to be paid for use of this technique. In either event, the technique should be used only where adequate evidence supports the investigation, and the intended third party victims ought to be fully, fairly, and quickly compensated.

Recommendations

Based on my Subcommittee's review, as well as the exhaustive review of the Senate Select Committee, I believe that the approach and specifics of S. 804 are fundamentally sound. I would suggest, however, that since the time of the Senate Select Committee's study, we have learned more about the adverse effects of undercover operations and considerably more about the efficacy of internal controls.

With respect to threshold standards for initiating an operation or targeting individuals, we now know that those with a stake in the investigation have not been able to make those judgments objectively. This failure has not necessarily been willful. It is more a question of self-deception. There are too many personal and institutional pressures to forge ahead, to ignore warning signals, to read guilt into every ambiguous word or gesture. In short, a neutral party should make this judgment. My Subcommittee recommended that the ancient and proven method for such a procedure be used - a judicial warrant.

Regarding the Undercover Review Committee, we have learned that thus far it has too often failed to effectively monitor operations, to spot problems before they occur, or to minimize them once they arise. Yet, even with a warrant requirement, their role should be an important one. A judge or magistrate is charged with assessing the adequacy of evidence, not balancing risks and benefits. Nor can a court be expected to monitor such operations on a regular or continuous basis.

We believe, as you apparently do, that the Undercover Revew Committee would be more effective if its membership were diversified. However, we would go further and recommend that the expertise of the Civil and Civil Rights Division of the Department of Justice be involved.

Regulating the conduct of agents and informants in an undercover operation is also addressed in S. 804. Your bill, however, continues the model found in the guidelines which implies that if high officials approve it, then conduct likely to inflict great harm on individuals or institutions may be approved. This approach is premised on the notion that those higher up in the hierarchy are more likely to proceed cautiously and with greater sensitivity to the personal and societal interests at stake. While this may be the case sometimes, our review has convinced us that where the stakes appear to be high, the opposite result can occur. That is, the supervisory levels are inclined to defer to the field and permit incautious developments in an operation when the targets or criminal activity is perceived as particularly important or newsworthy.

The conclusion of my Subcommittee, therefore, is that Congress ought to set clear limits on permissible undercover conduct: to decide, for example, whether or when it is alright to impersonate priests or reporters, to commit felonies, to perjure oneself. Both society and agents themselves need this kind of protection.

Finally, we concur that the law must be amended to provide compensation to those innocent bystanders who have been damaged by undercover operations. We have serious doubts as to the adequacy of existing law, and the litigative stance of the Department of Justice in these cases thus far has done little to reassure us that justice will be done.

Mr. Chairman, except for the warrant requirement, the Subcommittee was unanimous in our recommendations. Thus, there is agreement that the problem is very real and very much in need of legislative action. I commend you and your colleagues for taking the lead in this respect in introducing S. 804. I hope it will go far.

That concludes my prepared statement. I would be happy to answer any questions you may have.

Senator MATHIAS. Let me turn to Senator Denton. If there is no objection, I think we might adopt a 5-minute rule on questions.

OPENING STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Yes, sir, Mr. Chairman. I will just make an opening statement now and with whatever time you wish to restrict me to ask questions.

I want to thank you, Mr. Chairman, for the opportunity to participate in this hearing on S. 804. I am vitally interested in the bill, particularly as a member of the Judiciary Committee, the chairman of which just had to depart to open the Senate. I am also the chairman of the Subcommittee on Security and Terrorism, which might hold hearings on this bill.

The subcommittee has oversight responsibilities for both the Federal Bureau of Investigation and the Drug Enforcement Administration, two agencies at which the legislation is directed and two agencies which would be severely affected by it.

The chairman made reference to having Congressman Sensenbrenner offer testimony. We do have the dissenting view over there, saying, "Unfortunately, this report does not present an objective criticism of FBI undercover operations. It is a slanted and biased document that is aimed at closing down an effective and almost indispensable tool in combating organized crime, drug operations, fencing operations, and political corruption."

That much I do reach in the second paragraph of the minority report.

In my opinion, S. 804, as currently drafted, reflects a great deal of work, time and effort on the part of many talented people to try to address a number of concerns that arose when the investigations conducted by undercover operations touched Members of Congress, the operations being known as Abscam.

As we all know, several Members of the other body and a Member of this body were convicted of charges arising from the Abscam investigation.

The Senate select committee to study undercover activities of components of the Department of Justice, which my distinguished colleague from the State of Maryland chaired, was established specifically to investigate allegations of improprieties by components of the Department of Justice in the planning and conduct of the Abscam operation.

The proposed legislation that resulted from that select committee's efforts, S. 804, does contain some good provisions. Of particular merit is proposed section 3802 which would grant authority to Department of Justice law enforcement component when they are engaged in undercover operations to sign leases and contracts without regard to conflicting laws, rules and regulations; to set up proprietaries; to use the proceeds of a proprietary to offset expenses; to deposit appropriated funds and to enter into agreements with and to pay cooperating individuals.

I believe that provision would help to eliminate gray areas in the conduct of undercover operations, place them on sound legal ground and go a long way toward ensuring that Department of Justice law enforcement components are not themselves technically violating some laws while conducting undercover operations.

In my opinion, the provision could even be improved by amending proposed subsection 3802(c) to allow the use of proceeds not only from proprietaries but also from any operation to offset the expenses of any other operation involved and by expanding the scope of proposed subsection 3802(d) to allow the deposit of proceeds from undercover operations in banks and other financial institutions.

That having been said, I am greatly troubled by the remaining provisions of the bill as were the minority party members of the subcommittee in the House. As most of you well know, I have many times expressed my view and belief that the Federal Bureau of Investigation has been relatively hamstrung in its effort to execute its mission by some of the provisions of the domestic security guidelines under which it has had to operate since 1976.

Although Attorney General Smith has modified the guidelines, the difficulty has been compounded by overly restrictive interpretations of those guidelines by bureau and Department of Justice officials and in some instances, by the courts.

In my view, the net effect of S. 804 would be further to hamstring the FBI, not to mention the Drug Enforcement Administration and the Immigration and Naturalization Service.

S. 804 is a law which makes even more restrictive and less flexible the guidelines under which the Department of Justice is now operating. I am concerned that S. 804 does not define the term "undercover operation," a definition that seems to me is essential to the legislation.

In addition, the legislation does not make clear whether an agent acting in a one-shot emergency situation in an undercover capacity would be engaging in an undercover operation. For example, would an agent posing as a clergyman or journalist or hostage whose presence has been demanded immediately by terrorists who, in the absence of compliance, had threatened within the hour to blow up a church building or kill members of the congregation, would that agent impersonating the clergyman or journalist or hostage not be conducting an undercover operation? It seems a definition there is needed.

It seems to me readily apparent that the drafters of the bill, concentrating as they were on Abscam-type problems and two other examples, gave little or no thought to undercover operations conducted as part of foreign counterintelligence activities which would be affected.

The public reporting requirements of the bill, were they to be applied to undercover foreign counterintelligence operations, would provide an exercise in absurdity. The bill, at the very least, should define undercover operations and exclude undercover foreign counterintelligence operations.

The "probable cause" standard that would be imposed by proposed sections 3803(a)(3) and 3803(a)(4), that probable cause standard strikes me as dangerously ill-considered. If there is enough information in Government hands to establish and support a finding of probable cause, there would appear no need to initiate an undercover operation. One could proceed directly to the grand jury and seek an indictment and probably there would be a remission or dereliction of duty in not doing so.

I assure you, Mr. Chairman, that as chairman of the Subcommittee on Security and Terrorism to which S. 804 has also been referred, I will make every effort to insure that the bill receives full and fair consideration.

I commend you, Mr. Chairman, for your diligent efforts on the issue, and I mean that to both Senator Mathias as chairman here, Senator Thurmond as chairman of the Judiciary Committee, and I thank you, Mr. Chairman, presiding, for once again the opportunity to express my views about S. 804.

If you were to have permitted me an opening statement and then 5 minutes of questions, I will do that, sir. Otherwise, if you want to limit me to 5 now, I will be happy to wait until Senator Metzenbaum or yourself continue.

Senator **Mathias**. If Senator Metzenbaum is agreeable, why do you not go ahead with your 5 minutes of questions?

Senator **Metzenbaum**. I am going to have to leave, Mr. Chairman, to go to another committee hearing as you know.

Senator **Mathias**. Since it is agreeable to Senator Denton, why do you not go ahead with your questions?

Senator **Metzenbaum**. I am going to be very brief.

First, I would like to say to your distinguished witness this morning that I offer him congratulations on his great victory yesterday which has nothing at all to do with this hearing.

But second, I would like to inquire of you as to whether you have given any consideration to the concerns of the American Newspaper Publishers Association and the full implications of this legislation which indirectly authorizes the infiltration of the news media.

You have been a staunch supporter of concerns of civil rights and freedom of the press, and I am just wondering whether or not you have thought at all about the problems that I think they raise in their testimony which I am sure will be delivered at a later point.

Would you care to address yourself to that subject?

Mr. **Edwards**. Thank you, Senator Metzenbaum.

Yes, one of the recommendations we make in our report is that there be legislation delineating the amount of intrusion that there can be in these undercover activities, and we mention specifically what kind of rules there must be. Where they feel it necessary to impersonate a priest or a newspaper reporter or something, you have very grave first amendment problems in the infiltration of the free press of the United States. That would be one of the areas where we would hope legislation would be enacted as a part of the legislation that we suggest in our report.

Senator **Metzenbaum**. As I see it on its face, it gives me some cause for concern because it provides when a Government agent infiltrates any political, Government, religious, or news media organization or entity there shall be a finding that there is probable cause to believe the operation is necessary to detect or prevent specific acts of criminality.

That appears to be rather broad language, and it would not be too difficult to have such a finding made. I am afraid that it could almost get the point of being done on a casual basis, and I'm wondering whether you have any thoughts as to how that could be tightened up.

Mr. **Edwards**. Well, we consider the problem so serious, the fourth amendment problem so serious in undercover activities we find that an undercover agent who has infiltrated himself or herself into your home or into your circle of friends or your office or your newspaper is more intrusive in many ways than a telephone tap.

As the late Senator from Michigan, Senator Hart said, "An undercover agent is a walking, talking bug," terribly intrusive, and our report recommended that a warrant be required.

Senator **Metzenbaum**. Thank you.

Thank you, Mr. Chairman.

Senator **Mathias**. Senator Denton?

Senator **Denton**. Thank you, Mr. Chairman.

Congressman Edwards, I have already congratulated you on the diligence with which you pursued the subject. I have reviewed the report of the House Judiciary Subcommittee on Civil and Constitutional Rights concerning FBI operations.

And as the minority members referred to another report, the report of the Subcommittee on Civil and Constitutional Rights, the minority view which I referred to before, I have difficulty in seeing this report as a fair and balanced accounting of FBI procedures during undercover operations.

The language you used throughout the report appears to be slanted and biased against the FBI. For example, in the very first paragraph of the very first page of the report's introduction, you refer to the Abscam bribes that were, in fact, paid to public officials as "purportedly criminal transactions," and the, "alleged wrongdoing," of those public officials.

Reportedly criminal? Alleged wrongdoing? Were not all the Abscam defendants duly convicted? Have not all of their convictions been upheld on appeal? How can it be referred to as alleged wrongdoing and purportedly criminal acts? They were guilty. They were convicted. And it would seem that the very introduction discloses the slanted nature of the report.

Mr. **Edwards**. Well, Senator, we examined Abscam in some detail also, and I certainly am not here nor is any member of the subcommittee, indeed, nor of the House of Representatives or the Senate defending any of the people who were convicted of very serious crimes.

We did find in our investigation of Abscam that there were some real problems, that the criminal standard, the predisposition to criminal activity that is required under the guidelines of the FBI for the offer of a bribe, in a number of cases, were not followed, and innocent people were injured. They will have to carry some of the scars the rest of their lives. Your colleague in the Senate, Senator Pressler; Congressman Bill Hughes of New Jersey; Congressman Peter Rodino, and Congressman Jim Howard—all of them were targetted without any indication of a predisposition.

Abscam is a big subject, and I am sure that as we in the House and you in the Senate hold more hearings and study further the problems of undercover activity we will learn more. It is, as I say, a rather new technique insofar as the FBI is concerned. When I was an FBI agent many years ago, we did not have undercover operations. We investigated crimes the old fashioned way of after the crime was committed then we would try to investigate it and resolve it.

Mr. Sensenbrenner and the other two minority members of the subcommittee disagreed with one recommendation in the report, and that is a fact of life that we live with. However, again I will point out that of the four recommendations the report made, the minority agreed with three of them.

Senator **Denton**. It just appears that on balance to refer to purportedly criminal transactions and alleged wrongdoing and then to go on page 18 of the report to say, quote:

> In Operation Graylord, a recent investigation into case fixing in the Cook County, IL, Circuit Court, the Bureau, again, displayed shocking insensitivity to the implications of its actions.

Going on with the quote:

> Agents of the FBI reportedly indiscriminantly bugged the chambers of a judge, thereby impinging on the legitimate and necessary confidentiality of conversations.

I think a Republican Congressman made a statement yesterday which was quoted in this morning's paper to the effect that some of us may be distorting the evil in the institutions within our system relative to the system which they are, in many cases, set up to oppose and that the balance gets kind of out of kilter on television and that some of that is fed by this kind of imbalance, reportedly to indiscriminantly bug the chambers of a judge.

The problem I have with that part of the report, sir, is that you used press reports that have no basis, in fact, from which to draw a factual conclusion. Do you have evidence to conclude that the FBI, in fact, bugged a judge's chambers without a court order in that incident? Did you ask Judge Webster or bureau officials about those press allegations during the course of your extensive hearings before you wrote that in the report on page 18?

Mr. **Edwards**. Special counsel who examined the papers said that they had a warrant but they listened indiscriminantly for a long period of time to every conversation that went on in the judge's chambers.

Senator **Denton**. I thought that a warrant entitled them to listen or I believe that the implication here is that they reportedly indiscriminantly bugged the chambers, we talk about shocking insensitivity to the implications of their actions impinging on the legitimate necessary confidentiality of conversations.

It seems that it is rather a vague link you have to reach such a definitive conclusion about the indiscrimination and the legitimacy and confidentiality. It seems that what you are now bringing up is that perhaps they listened too long and I do not know how they would know how long to listen if they have the warrant and they are conducting an investigation.

Mr. **Edwards**. Well, Senator, that is why we would recommend that the warrant for undercover activities have a time limitation and describe explicitly what they are after. Warrants that are as broad as this one apparently was are certainly inappropriate where a judge is concerned.

Senator DENTON. In other words, you want to change the situation, but under the existing law, they had a warrant to eavesdrop and to call that indiscriminantly bugging and shocking insensitivity and impinging on the legitimate and necessary confidentiality of conversation is another subject than the one you now raised which is the necessity in your view, to change the law or the guidelines.

They were preconvicted, it appears to me, by your allegations there which may not be entirely accurate.

Mr. EDWARDS. Well, Senator, if a warrant is issued by, we will say, a local judge for the bugging of a judge's chambers, it should be done with great care, with a time limitation and certainly the warrant should not include indiscriminant listening.

Senator DENTON. But the implication here anyone would draw, I believe, if you asked a hundred people, that there was no warrant from the way this is written, and I plan on asking Judge Webster about that today, and I am as interested in clearing up those allegations once and for all as anyone.

If that is 5 minutes, Mr. Chairman, I yield to you.

Senator MATHIAS. That is a little bit more than 5 minutes but I did not interrupt you because there are no other Senators waiting to question. I would just comment that Mr. Jensen has to leave town, and I am anxious to get to Mr. Jensen and Judge Webster as soon as possible, if you have a final question you want to ask Mr. Edwards.

Senator DENTON. Yes, sir.

In discussing the establishment of threshold requirements for initiating an undercover operation on pages 83 and 84 of the committee report, you say that, quote:

> While the subcommittee does not question the good faith of the individuals involved in undercover operations, either in the field or at supervisory levels, their role as investigators and protectors of the missions of the FBI is incompatible with challenging their own assumptions and suspicions in the manner of a neutral and detached judicial office.

There seems to be a paradox there. How can you not be questioning their good faith if you cannot believe that they conduct undercover operations in an objective and detached manner?

Mr. EDWARDS. Well, Senator, I am a veteran of COINTELPRO investigations also where hundreds of thousands of domestic intelligence investigations were opened on U.S. citizens without the criminal standard.

I happen to believe that the criminal standard is the basis of protection that all Americans are entitled to, that police and FBI should not go around investigating Americans with all of the dangers that exist in an investigation, all the possible damage that is done in a neighborhood, in a person's business, a person's marriage with a police investigation going on, that they should not be investigated unless there is darn good reason to think they might be engaged in criminal activity.

That is the heart of what I believe all police organizations should respect.

Senator DENTON. Well, I am on your side with wanting there to be civil rights. There is a question of balance between those and security in these matters, and it will be a matter of judgment for all of you to make these decisions. I am questioning specific aspects of your report.

On page 84:

> Unlike the Senate Select Committee, the subcommittee believes it makes little difference in this regard whether the requirements are set forth as the will of Congress or in internal guidelines.
>
> Our review of operations demonstrates that neither the bureau nor their counterparts in the Criminal Division of the Department of Justice can or will meaningfully enforce threshold requirements.
>
> It is for this reason that the subcommittee has concluded that judicial authorization is required to satisfy the predication requirement in a meaningful way.

If it makes little difference in your opinion whether the requirements for initiating undercover operations are set forth in law as the will of Congress or in internal guidelines, then why are we here discussing S. 804?

Mr. EDWARDS. Well, Senator, it is very difficult for any organization to enforce internal guidelines especially when there are very large stakes. We did find and the report documents where these guidelines and the threshold requirements were not followed.

Senator DENTON. That is all the questions I have, Mr. Chairman. Thank you, Congressman.

Mr. EDWARDS. Thank you.

Senator MATHIAS. Senator Spector, do you have any questions of Mr. Edwards?

Senator SPECTER. Thank you, Mr. Chairmam.

I am sorry I could not be here earlier. I do have a question for Congressman Edwards. Would the standards required for judicial authorization be as tough as probable cause for the issuance of a search warrant or probable cause for the issuance of an arrest warrant or some lesser reason to believe or suspicion to warrant an investigation?

Mr. EDWARDS. Senator, I think I would be satisfied as a starter with reasonable suspicion of criminal activity.

Senator SPECTER. Reasonable suspicion of criminal activity. Is that standard present in any other proceeding? We are all well aware of the level of probable cause for a warrant of arrest, level of cause for search and seizure, that kind of a warrant.

When you start dealing with suspicion for an investigation, that, at least to my knowledge, starts to be on ground, and I am not suggesting it is wrong, but I am just wondering if there are any analogies or any similar standards used in any other kind of a field.

Mr. EDWARDS. Senator, that is the standard used by the FBI in their guidelines for undercover activities.

Senator SPECTER. But what does it mean? It has not been subjected, at least to my knowledge, to judicial interpretation as to what—reasonable suspicion is the standard which you articulate?

Mr. EDWARDS. Well, I would rather have probable cause, but reasonable suspicion, we are going to be fortunate to get that. That would offer a lot of protection if the warrant only could be issued with reasonable suspicion.

Senator SPECTER. How would that be defined? What would that amount to? Somebody would have to have made an allegation? Would an anonimous tip be sufficient for a reasonable suspicion?

Mr. **Edwards**. Counsel points out that it would be comparable to the standard that is utilized now and has been established by courts for stopping and frisking a suspect on the street.

Senator **Specter**. For stopping and frisking. Something less than probable cause for a search and seizure?

Mr. **Edwards**. That is correct.

Senator **Specter**. It would not take a whole lot to have suspicion. Whether suspicion is reasonable or not is another issue. What you are really driving at, Congressman Edwards, is just to stop investigations which have no predicate or no basis at all or no point of origin, just random investigations?

Mr. **Edwards**. There certainly should not be random investigations. There should not be fishing expeditions. The police agencies of this country, including the FBI, should not be investigating people unless there is criminal activity about to take place or taking place. That is the criminal standard and that is what I believe in.

Senator **Specter**. That is the objective. If there is criminal activity, no one would disagree, but the difficulty is trying to define when there is a basis to proceed to try to uncover that criminal activity.

I think your point is a very important one, Congressman Edwards. I wrestle with what it really means and how it would be carried out. We will be hearing more witnesses today to see if there are, in fact, random investigations that have no predicate and what reasonable suspicion would amount to.

Mr. **Edwards**. The Senator has had wide experience, much more than I, as a prosecutor and as a district attorney so I know that you will give that very deep thought.

Senator **Specter**. I have been involved in many investigtions. I have never ordered an investigation, sent detectives out or police officials out if there was not some basis for doing so, if there had not been some complaint.

Sometimes a complaint may not rise too high in terms of the level of credibility or reliability. It may be an anonimous tip or it may be a series of anonimous tips or it maybe a rumor which may arise for a judge or some public official which will lead to some sort of an inquiry, not so far as to make offers or to seek to see if somebody would be susceptible to a bribe.

But it is a hard definition. It is one which is really untested in our law today to talk about reasonable suspicion, and I am interested to hear your comments.

Thank you very much.

Senator **Mathias**. Thank you very much, Mr. Edwards.

Mr. **Edwards**. Thank you, Mr. Chairman.

Senator **Mathias**. Our next witnesses will appear as a panel. Mr. Jensen, representing the Department of Justice; and William H. Webster, Director of the Federal Bureau of Investigation.

STATEMENTS OF A PANEL CONSISTING OF LOWELL JENSEN, ASSOCIATE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, AND WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, WASHINGTON, DC

Mr. JENSEN. Members of the subcommittee, I am very pleased to be here. If it would be satisfactory to the Chair, perhaps I would proceed, and then Judge Webster could follow on the statement that I make, and then we could be available for questioning thereafter.

Senator MATHIAS. That is entirely satisfactory to the Chair if it is agreeable to the two of you.

Mr. JENSEN. Thank you, Mr. Chairman. We appreciate the opportunity to be here. You have pointed out that this is a matter of great concern and great sensitivity. It is a matter of distinct importance certainly to the law enforcement activities of the Federal Government and to the public and the areas that you pointed out in terms of the great concern and sensitivity we share.

So I would thank you for this opportunity to be here after the extensive hearings that have been held and to comment on this bill. If I may directly, then, I would like to have the opportunity to put my statement into the record in full before I address it, if that is satisfactory to the Chair.

Senator MATHIAS. Without objection, your full statement will appear in the record.

Mr. JENSEN. Mr. Chairman and members of the subcommittee I am pleased to be here today to present the view of the Department of Justice on S. 804, a bill dealing with undercover operations. As the members of the subcommittee know, undercover operations have long been an important part of Federal law enforcement and are crucial to the investigation of crimes usually committed in clandestine manner or by secretive organized groups. Major crimes such as drug trafficking, espionage, racketeering, terrorism, and public corruption fall into these categories and can often be successfully investigated only by means of undercover operations. Therefore, it is vital that the subcommittee approach any legislation in the area with the view of not imposing unnecessary obstacles to effective law enforcement.

We also recognize that undercover law enforcment operations can pose legal and policy issues of particular sensitivity. The intent of S. 804 is evidently to protect law abiding citizens from the harmful effects of an overreaching undercover operation. While we share that objective, the bill, in our judgment, attempts to regulate undercover operations in ways that are overly stringent and would, as a result, jeopardize legitimate and vital undercover operations. Moreover, S. 804 would drastically alter the law of entrapment and tort liability in ways that have been repeatedly and for sound reasons rejected by the courts and that would unjustifiably impede the use of undercover operations without benefit to truly innocent citizens. For these reasons and despite the fact that the bill contains some features that we find unobjectionable, the Department of Justice is constrained on balance to strongly oppose S. 804.

Section 2 of the bill adds, and if I could address the specific portions of the bill, Mr. Chairman, section 2 adds new sections 3801 to

3805 to title 18 of the United States Code. I will discuss those sections in turn. Section 3801 would set out statutory authority for the undercover operations generally, would provide for Attorney General guidelines governing their initiation and execution and would provide for reports to the Congress on the guidelines and their interpretation.

Initially, we point out that, as a legal matter, subsection 3801(a), which gives the Attorney General specific authority to authorize the conducting of undercover operations by the Department of Justice in accordance with guidelines to be promulgated in accordance with the new statute, is unnecessary. There is no question but that the Attorney General's present authority to direct and supervise the investigation of federal offenses extends to the use of undercover operations and the issuance of governing guidelines. Such guidelines are now in effect for the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Immigration and Naturalization Service. There is thus no need for codification of these authorities of the Attorney General.

The subject matters which subsection 3801(b) would require to be included in the guidelines are for the most part unobjectionable. However, we do not support proposed subsection (b)(6) which requires that the Undercover Review Committee for each component of the Department have no less than six members including one Assistant Director of the FBI and a representative of the Office of Legal Counsel. The composition of these committees should be left to the discretion of the Attorney General so that the membership can reflect the anticipated nature of the work of each committee. In particular, there is no reason for an official of the high level of an Assistant Director of the FBI to be required to serve on these committees. Indeed, under current FBI guidelines, it is an Assistant Director who, based on the recommendation of the Undercover Review Committee, is authorized to make ultimate decisions regarding many proposed undercover operations. Moreover, there is no justification for requiring any official of the FBI to serve on a committee reviewing those operations proposed by agencies such as the DEA or INS.

Proposed subsection 3801(c) would require that the Attorney General submit to the Congress every guideline and amendment and every formal interpretation of such a guideline at least 30 days before they are promulgated. As I indicated, the guidelines are matters of public record. Accordingly, we have no objection to transmitting to the Congress any new or amended guidelines or to responding to congressional requests regarding the manner in which we interpret the guidelines. However, the 30-day delay requirement could inhibit our ability to amend or formally interpret the guidelines in response to a rapidly evolving situation. More important, the phrase formal interpretation of the guidelines is apparently intended to require a report to the Congress in every instance in which the department determines that an action would or would not be subject to a provision in the guidelines. We strongly oppose such a requirement. It would cause undue delays in investigations and could prematurely reveal new investigative technques. Even if procedures could be devised to overcome these problems, such a reporting requirement would discourage our investigative agencies from seeking legal advice and interpretation of guidelines from their own legal counsel and from the Department's Office of Legal Counsel. Moveover, it is a firm policy of the Department not to discuss ongoing investigations and we believe that any requirement for submitting reports to the Congress during the pendency of an investigation would represent an improper interference with the responsibilities of the executive branch to enforce criminal laws.

The Department of Justice generally supports the goals of proposed section 3802 with certain amendments. This section is designed to overcome limitations and ambiguities concerning the authority of our investigative agencies to enter into contracts and leases, establish proprietaries, use the proceeds generated by a proprietary and enter into agreements with cooperating individuals in connection with undercover operations. As to the substance of the provisions, we would recommend first that proposed section 3802(c) be amended to allow the use of proceeds not only of proprietaries but of any undercover operation to offset necessary and reasonable expenses of the operation. Second, subsection 3802(d) which would allow the deposit of appropriated funds in banks or other private financial institutions should be expanded to allow the deposit of proceeds of an undercover operation.

We point out that the authority of the FBI to deposit appropriated funds and the proceeds of an undercover operation in financial institutions is currently contained in subsection 205(b)(1)(C) of Public Law 98-166, the Department's appropriations act for fiscal year 1984. This provision will expire after September 30. However, the Department has requested that the FBI be given permanent authority to deposit appropriated funds for undercover operations and the proceeds of such operations in banks and other financial institutions without regard to the provisions of 18 U.S.C. 684 and 31 U.S.C. 3302 which generally forbids such deposits. Language to accomplish this was in the Department's authorization bill for fiscal year 1985 as introduced. However, as reported out by the Judiciary Committee, S. 2606 would not make such authority permanent but would only continue it for the next fiscal year. As marked up by the House Judiciary Committee, H.R. 5468 would also make this authority only temporary. Nevertheless we believe that the authorization process is the appropriate means by which to pursue this matter. In sum while we agree with the evident intent of S. 804 that such authority should be made permanent, that bill is in our judgment an inappropriate vehicle by which to accomplish this objective.

We are strongly opposed to section 3803. This section would impose statutory limitations on the initiation of undercover operations and offering of an inducement or opportunity to commit a crime. Basically, our objection to this part of the bill is that it imposes specific, inflexible standards on our investigative agencies that do not take into account the variety of situations arising in actual investigations. Nor can statutory standards be readily adjusted to conform to our evolving experiences with undercover operations. As the subcommittee knows, we face today a more sophisticated and dangerous breed of criminal than ever before and investigative techniques, including undercover operations, must constantly be refined and adjusted to counteract this threat.

In our view, the proper and most practical method for establishing investigative thresholds is through Attorney General guidelines, which set forth investigative procedures within the larger confines of the law. The advantages of guidelines are that they can be general enough to apply to varied fact situations and flexible enough to permit appropriate responses to specific cases. This allows for the exercise of judgment on the part of our most experienced investigators and prosecutors and consideration of the exigencies of each particular investigation. Likewise, guidelines are subject to constant revision and improvement not possible with a statutory scheme.

Moveover, an examination of the standards set out in proposed section 3803 shows that several of them are overly restrictive. For example, section 3803(a)(1) requires, as to operations intended to obtain information about an identified individual, a reasonable suspicion that the individual "has engaged, is engaging, or is likely to engage in criminal activity" before an undercover operation may be used to obtain information about him. However, undercover operations, like all investigations, may involve gathering information about witnesses, victims, and others not engaged in criminal activity. The names, addresses, and other data about such persons are often essential to the investigative process. This part of the bill would preclude the use of undercover techniques to obtain this vital investigative information.

Proposed subsection (a)(2) deals with situations in which the undercover operation, such as a classic "sting" operation involving fencing stolen goods, is intended to obtain information about a type of criminal activity and similarly requires reasonable suspicion that such activity is taking place before an operation can be mounted. The subsection goes on to provide, however, that if in the course of the operation law enforcement agents wish to offer a specific individual an inducement to commit a criminal act, they may do so only upon a finding—by the Undercover Operations Review Committee, or in certain circumstances by the head of the field office in charge—that there is reasonable suspicion that the targeted person has engaged, is engaging, or is likely to engage in criminal activity. These provisions do not take into account the fast-moving nature of many undercover operations. For example, in a sting operation involving the setting up by the FBI of a phony business trading in stolen merchandise, how are the agents to handle a situation in which an individual comes in off the street, states his understanding of the fact that the proprietors have stolen goods available, and indicates a willingness to buy some if the price is right? Unless the head of the field office is to be present at all times, no opportunity exists to obtain the kind of advance approval that the bill contemplates for the agents to negotiate with people as to a price, yet if they decline to do so, that is, to offer an inducement, the individual may become suspicious and the entire operation may be jeopardized. Clearly, it would seem necessary to provide that the initial authorization of the operation carry with it an authorization to follow through by offering such inducements as to reasonable foreseeable but previously unidentified individuals, who display interest in participating in criminal activity.

Senator **Mathias**. Mr. Jensen, I do not want to interrupt you but I am wondering if you can summarize this as much as possible.

Mr. **Jensen**. Sure. The point I am about to make is that the section 3803(a) (3) and (4) define infiltration of political, governmental, religious or news media organizations and recognize the sensitive nature of that as do the guidelines that are presently in existence.

We believe that the threshold that is there is far too high. This is much too high a threshold for the investigative techniques that are necessary. We believe also that there needs to be a definition of these types of activities in that the groups that may fall within the broad term of religious or political are such that we may find ourselves with problems about whether or not the PLO or the Ku Klux Klan would be deemed political entities subject to the bill's more rigorous threshold requirements for conducting such operations.

If I may move forward then to the next subsection, 3803(e), the problem is that the guidelines indicate that this subsection states the failure to comply with this section shall not provide a defense in any criminal prosecution or create any civil claim for relief.

The difficulty, however, is that this may create a new situation where the remedy of suppression of evidence may be now predicated upon such a violation, and we do not believe that is justified.

The next portion of my commentary deals with the expansion of tort liability. We believe that the expansion of the tort liability contemplated by the bill is far too great, that it even reaches situations in which there is no knowledge or negligence on the part of the Government.

We do not feel that there is a justification for making the U.S. civilly liable for an individuals' tortious conduct for which the Government bears no responsibility whether in the context of an undercover operation or other Government activity.

The next point I make is that proposed section 3805 requires an annual report. We really have no objection to the oversight that I made reference to before, but this section would apparently require a report of every undercover operation, and it is out of proportion to the benefit that could be to Congress from oversight. It would appear to require a report on every drug buy particularly. Virtually every drug case is made by the use of some undercover technique.

The number of drug prosecutions runs annually into the thousands, and we do not think that the requirement would be one which would benefit the purpose for which Congress has in mind.

The next portion of that, I think, is very important. The section would require information on terminated operations that have not yet resulted in arrest, indictment or trial, and information on any ongoing operation if it had been approved more than 2 years earlier.

A major undercover operation may itself last longer than 2 years and resulting trials and appeals much longer still. I mentioned earlier the Department of Justice is strongly opposed to requirements that we disclose in a public document information about an undercover operation prior to the conclusion of trial or termination of the covert activity itself for the obvious reason that such disclosure would jeopardize investigations and prosecutions as well as the safety of government agents and informants and cooperating witnesses and victims.

Next, it applies to all undercover operations, the text does, and I think as Senator Denton has pointed out under that kind of a text, it could require reports on foreign counterintelligence operations which we do not think is appropriate.

The final portion of my testimony deals with the codification of an entrapment defense which would be for the first time proposed by this bill. We are opposed to the codification of the entrapment as it is set forth in S. 804.

We point out that the codification is a change of law; that, under current case law, it is recognized that merely affording a person an opportunity or the means to commit a crime does not constitute entrapment, and the courts have further upheld and noted the necessity of using undercover techniques such as infiltration of organized groups and general artifice and strategem, in quotes, to catch those engaged in criminal enterprises.

The key element of the existing entrapment defense surrounds the issue of inducement. The defense of entrapment is met if the facts show that the defendant was an otherwise innocent person whom the Government through the creative activity of its officials caused to commit the crime.

Thus when the Government provides some inducement to an individual to commit an offense, as it frequently must in the course of undercover operations, the Government must establish that the individual was predisposed toward the criminal activity.

This, in turn, involves a subjective inquiry into the defendant's inclination to commit the crime and permits evidence to be introduced demonstrating the defendant was not an ordinary law-abiding citizen suddenly confronted by overwhelming temptations offered by law enforcement officials to commit an offense but instead was seeking to engage in criminal activity.

In other words, the present formulation focuses on the guilt or innocence of the defendant and does not focus, as this formulation would in a so-called objective test only on the methods used by the Government in such fashion that the definition would be such that the methods would be prohibited if those methods more than likely would have caused a normally law-abiding citizen to commit a similar offense.

In applying that test, the predisposition of a defendant would be irrelevant. Such a recasting of the entrapment defense would mean, for example, that an established narcotics dealer with several prior convictions could not be convicted of drug smuggling if he convinced the jury that the purchase price offered by an undercover agent would have been sufficient to cause a normally law-abiding citizen to commit such an act.

We do not think that is an appropriate definition.

We will move on to one other portion of the entrapment bill that is proposed here that we feel is problematic, and that is, that in this definition of entrapment there appear to be a definition or presumptions that would establish a per se entrapment defense.

The first of these presumptions would be triggered if the defendant commits the crime because the Government threatens harm to the person or property of an individual. We agree that in such a case conviction generally should be barred, but the provision is extremely broad and could have unforeseen effects.

It may be in the middle of a narcotics sale where the language used could fall within those terms. It would also apply even though the harm is not known as far as the undercover operation is concerned.

The second presumption would establish entrapment as a matter of law if the Government, "manipulated the personal, economic or vocational situation of the defendant."

This provision is extremely vague, and if broadly construed, could be read to prohibit the offering by an undercover agent of a bribe to a predisposed corrupt official. Moreover, every narcotics purchase represents some manipulation of the economic situation of those who participate, no matter how willingly.

While we assume that some narrow interpretation was intended for this language, the fact is that this presumption offers numerous loopholes to be exploited by defendants. The government will be powerless to rebut the presumption regardless of the defendant's criminal record or predisposition to commit the offenses.

The third presumption would apply to situations where goods or services are provided in the course of the undercover operation to a defendant where those, "could not have been obtained" without the Government's help.

This provision would overturn Supreme Court cases holding that the supplying of contraband or hard to obtain services to predisposed drug traffickers does not constitute entrapment, and the provision would cast doubt on the reasonable practice of a Government agent supplying limited amounts of contraband to show good faith or establish credibility.

It would seem even to preclude a sale by an undercover agent of classified defense information or controlled high technology to a person who had amply demonstrated his desire to make the purchase.

This provision, like the other two presumptions, could bar the use of reasonable undercover techniques and allow acquittal of experienced, predisposed criminals without providing any additional protection to innocent citizens.

I believe that that covers the areas of the statement. Mr. Chairman, that concludes my statement. I have indicated we appreciate very much the opportunity to be here and offer these observations on the bill. I would be happy to answer questions.

[The prepared statement of Mr. Jensen and responses to questions follow:]

PREPARED STATEMENT OF D. LOWELL JENSEN

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice on S. 804, a bill dealing with undercover operations. As the members of the Subcommittee know, undercover operations have long been an important part of federal law enforcement and are crucial to the investigation of crimes usually committed in clandestine manner or by secretive, organized groups. Major crimes such as drug trafficking, espionage, racketeering, terrorism and public corruption fall into these categories and can often be successfully investigated only by means of undercover operations. Therefore it is vital that the Subcommittee approach any legislation in this area with the view of not imposing unnecessary obstacles to effective law enforcement.

We also recognize that undercover law enforcement operations can pose legal and policy issues of particular sensitivity. The intent of S. 804 is evidently to protect law abiding citizens from the harmful effects of an overreaching undercover operation. While we share that objective, the bill in our judgment attempts to regulate undercover operations in ways that are overly stringent and would as a result jeopardize legitimate and vital undercover operations. Moreover, S. 804 would drastically alter the law of entrapment and tort liability in ways that have been repeatedly and for sound reasons rejected by the courts and that would unjustifiably impede the use of undercover operations without benefit to truly innocent citizens. For these reasons, and despite the fact that the bill contains some features that we find unobjectionable, the Department of Justice is constrained on balance to strongly oppose S. 804.

PART I. UNDERCOVER OPERATIONS

Section two of the bill adds new sections 3801-3805 to title 18 of the United States Code. I will discuss each new section in turn. Section 3801 would set out statutory authority for undercover operations generally, would provide for Attorney

General guidelines governing their initiation and execution, and would provide for reports to the Congress on the guidelines and their interpretation.

Initially, we point out that, as a legal matter, subsection 3801(a), which gives the Attorney General specific authority to authorize the conducting of undercover operations by the Department of Justice in accordance with guidelines to be promulgated in accordance with the new statute, is unnecessary. There is no question but that the Attorney General's present authority to direct and supervise the investigation of federal offenses extends to the use of undercover operations and the issuance of governing guidelines. Such guidelines are now in effect for the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) and the Immigration and Naturalization Service (INS).[1] There is thus no need for codification of these authorities of the Attorney General.

The subject matters which subsection 3801(b) would require to be included in the guidelines are, for the most part, unobjectionable. However, we do not support proposed subsection (b)(6) which requires that the Undercover Review Committee for each component of the Department have no less than six members including one Assistant Director of the FBI and a representative of the Office of Legal Counsel. The composition of these committees should be left to the discretion of the Attorney General so that their membership can reflect the anticipated nature of the work of each committee. In particular, there is no reason for an official of the high level of an Assistant Director of the FBI to be required so serve on these committees. Indeed, under current FBI guidelines it is an Assistant Director who, based on the recommendation of the Undercover Review Committee, is authorized to make ultimate decisions regarding many proposed undercover operations. Moreover, there is no justification for requiring any official of the FBI to serve on a committee reviewing those operations proposed by agencies such as the DEA or INS.[2]

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[1] The INS guidelines are the most recent to go into effect. They were approved by the Attorney General on March 5, 1984, and were implemented on March 19, 1984.

Proposed subsection 3801(c) would require that the Attorney General submit to the Congress every guideline and amendment and every "formal interpretation" of such a guideline at least 30 days before they are promulgated. As I indicated, the guidelines are matters of public record. Accordingly, we have no objection to transmitting to the Congress any new or amended guidelines or to responding to Congressional requests regarding the manner in which we interpret the guidelines. However, the 30 day delay requirement could inhibit our ability to amend or formally interpret the guidelines in response to a rapidly evolving situation. More important, the phrase "formal interpretation" of the guidelines is apparently intended to require a report to the Congress in every instance in which the Department determines that an action would or would not be subject to a provision in guidelines. We strongly oppose such a requirement. It would cause undue delays in investigations, and could prematurely reveal new investigative techniques. Even if procedures could be devised to overcome these problems, such a reporting requirement would discourage our investigative agencies from seeking legal advice and interpretations of guidelines from their own legal counsel and from the Department's Office of Legal Counsel. Moreover, it is a firm policy of the Department not to discuss ongoing investigations and we believe that any requirement for submitting reports to the Congress during the pendency of an investigation would represent an improper interference with the responsibility of the Executive Branch to enforce criminal laws.

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[2] Membership of an attorney in the Department's Office of Legal Counsel (OLC) is also not necessary and would be wasteful of resources. OLC attorneys typically do not become involved in particular investigations or prosecutions. Current practice is to solicit the views of OLC on unusally difficult or complex legal issues that arise during the work of the committees. This procedure is working well and full time OLC membership is not necessary.

The Department of Justice generally supports the goals of proposed section 3802 with certain amendments. This section is designed to overcome limitations and ambiguities concerning the authority of our investigative agencies to enter into contracts and leases, establish proprietaries, use the proceeds generated by proprietaries, and enter into agreements with cooperating individuals in connection with undercover operations. As to the substance of the provisions, we would recommend first that proposed section 3802(c) be amended to allow the use of proceeds not only of proprietaries, but of any undercover operation, to offset necessary and reasonable expenses of the operation. Second, subsection 3802(d) which would allow the deposit of appropriated funds in banks and other private financial institutions should be expanded to allow the deposit of the proceeds of an undercover operation.

We point out that authority of the FBI to deposit appropriated funds and the proceeds of an undercover operation in financial institutions is currently contained in subsection 205(b)(1)(C) of P.L. 98-166, the Department's appropriations act for fiscal year 1984. This provision will expire after September 30th. However, the Department has requested that the FBI be given permanent authority to deposit appropriated funds for undercover operations and the proceeds of such operations in banks and other financial institutions without regard to the provisions of 18 U.S.C. 648 and 31 U.S.C. 3302 which generally forbid such deposits. Language to accomplish this was in the Department's authorization bill for FY 1985 as introduced (S. 2606 and H.R. 5468). However, as reported out by the Judiciary Committee, S. 2606 would not make such authority permanent but would only continue it for the next fiscal year. As marked up by the House Judiciary Committee, H.R. 5468 would also make this authority only temporary. Nevertheless we believe that the authorization process is the appropriate means by which to pursue this matter. In sum while we agree with the evident intent of

S. 804 that such authority should be made permanent, that bill is in our judgment an inappropriate vehicle by which to accomplish this objective.

We are strongly opposed to section 3803. This section would impose statutory limitations on the initiation of undercover operations and the offering of an inducement or opportunity to commit a crime. Basically, our objection to this part of the bill is that it imposes specific, inflexible standards on our investigative agencies that do not take into account the variety of situations arising in actual investigations. Nor can statutory standards be readily adjusted to conform to our evolving experiences with undercover operations. As the Subcommittee knows, we face today a more sophisticated and dangerous breed of criminal than ever before and investigative techniques, including undercover operations, must constantly be refined and adjusted to counteract this threat.

In our view, the proper and most practical method for establishing investigative thresholds is through Attorney General guidelines, which set forth investigative procedures within the larger confines of the law. The advantages of guidelines are that they can be general enough to apply to varied fact situations and flexible enough to permit appropriate responses to specific cases. This allows for the exercise of judgment on the part of our most experienced investigators and prosecutors and consideration of the exigencies of each particular investigation. Likewise, guidelines are subject to constant revision and improvement not possible with a statutory scheme.

Moreover, an examination of the standards set out in proposed section 3803 shows that several of them are overly restrictive. For example, section 3803(a)(1) requires, as to operations intended to obtain information about an identified individual, a reasonable suspicion that the individual "has engaged, is engaging, or is likely to engage in criminal activity" before an undercover operation may be used to obtain information about him. However, undercover operations, like all investigations, may involve gathering information about witnesses, victims, and others not engaged in criminal activity. The names, addresses, and other data about such persons are often essential to the investigative process. This part of the bill would preclude the use of undercover techniques to obtain this vital investigative information.

Proposed subsection (a)(2) deals with situations in which the undercover operation, such a classic "sting" operation involving fencing stolen goods, is intended to obtain information about a type of criminal activity and similarly requires reasonable suspicion that such activity is taking place before an operation can be mounted. The subsection goes on to provide, however, that if in the course of the operation law enforcement agents wish to offer a specific individual an inducement to commit a criminal act, they may do so only upon a finding -- by the Undercover Operations Review Committee, or in certain circumstances by the head of the field office in charge -- that there is reasonable suspicion that the targeted person has engaged, is engaging, or is likely to engage in criminal activity. These provisions do not take into account the fast-moving nature of many undercover operations. For example, in a "sting" operation involving the setting up by the FBI of a phony business trading in stolen merchandise, how are the agents to handle a situation in which an individual comes in off the street, states his understanding of the fact that the proprietors have stolen goods available, and indicates a willingness to buy some if the price is right? Unless the "head of the field office" is to be present at all times, no opportunity exists to obtain the kind of advance approval that the bill contemplates for the agents to negotiate with the person as to a price, yet if they decline to do so (i.e. to "offer an inducement") the individual may become suspicious and the entire operation may be jeopardized. Clearly, it would seem necessary to provide that the initial authorization of the operation carry with it an authorization to follow through by offering such inducements as to reasonably foreseeable but previously unidentified individuals, who display interest in participating in criminal activity.

Proposed subsections 3803(a)(3) and (4) severely limit the use of undercover operations in situations where an undercover operative "will infiltrate any political, governmental, religious, or news media organization or entity," or where a person acting in an undercover capacity will enter into a confidential professional relationship such as by posing as a clergyman or physician. The potentially sensitive nature of such operations does require particular care in determining whether the use of an undercover technique is appropriate, but the bill would require a finding of "probable cause" to believe that the operation is necessary to detect or prevent specific criminal acts. This is too high a threshold for the use of an investigative technique and, indeed, in many cases would define those situations in which an undercover operation would be unnecessary because probable cause already exists to arrest the subjects or to conduct a search. Rather than imposing a "probable cause" standard for using an undercover technique in these sensitive areas, a better approach would be to require a high-level decision with respect to such an undercover investigation. This is presently the case under the Department's FBI undercover operations directed at offenses conducted by groups claiming to be religious or political organizations. These problems are further complicated by the fact that the bill contains no definitions for the terms "religious" and "political" organization or for what is meant by the term "to infiltrate" such an organization. Many terrorist or violent organizations may claim to be religious or political in nature. The legislation gives no guidance, for example, as to whether the Palestine Liberation Organization (PLO) or the Ku Klux Klan (KKK) would be deemed "political" entities subject to the bill's more rigorous threshold requirements for conducting undercover operations.

Proposed subsection 3803(e) is also problematic in that it may be read to authorize, for the first time, the bringing of motions to suppress evidence based on a violation of the guidelines. Currently, under United States v. Caceres, 440 U.S. 741 (1979), and similar cases, it is generally held that a violation by an agency of its internal guidelines does not create grounds for the suppression of evidence in a criminal prosecution. The Caceres opinion indicates, however, that violations of a statute, or of guidelines mandated by a statute, may well support a suppression motion, in the absence of contrarily stated congressional intent. Id at 747-755. Proposed subsection 3803(e) states that failure to comply with the section "shall not provide a defense in any criminal prosecution or create any civil claim for relief". It is at least doubtful, however, whether a motion to suppress evidence would be deemed either a "defense" or a "civil claim". Thus, unless clarified, the legislation could have the devastating effect of authorizing the remedy of suppression for a violation, however inadvertent or justified by the particular circumstances the "violation" may have been.

The Department of Justice is also strongly opposed to section 3804 which would vastly expand the civil liability of the United States for tortious conduct with some nexus to an undercover operation. In effect, this section would make the United States strictly liable for wrongful acts bearing even the most tenuous connection to an undercover operation. What is particularly disturbing about this provision is that it would abandon the most basic principles of tort liability and impose liability on the United States irrespective of whether there was any showing that the proximate cause of the injury was a wrongful or negligent act on the part of the government or its employees. For example, the United States would be liable for damages caused by a private individual cooperating in an undercover operation even if he were acting in violation of specific instructions and concealed his conduct from supervising agents.

To the extent that injury to a private person is caused by the government's wrongful or negligent supervision of an undercover operation, a remedy is available under the present provisions of the Tort Claims Act (28 U.S.C. §2671 et seq.). Moreover, the concept of negligence is a flexible one under which the standard of care imposed on the government increases where there is a foreseeable risk of injury to the nature of a particular operation. There is no justification for making the United States civilly liable for an individual's tortious conduct for which the government bears no responsibility, whether in the context of undercover operations or other government activity.

Proposed section 3805 would require the Attorney General to file an annual report with the Congress concerning all terminated undercover operations and all operations approved more than two years prior to the report date irrespective of whether they have been ended. In principle, the Department has no objection to providing Congress with information on our undercover operations but the scope of the reporting requirements imposed by this section is unreasonable. First, the administrative burden caused by this section is out of all proportion to the benefit to the Congress. For example, the section makes no distinction between routine, everyday operations such as a drug buy and other more significant undercover investigations. Since virtually every drug case is made by the use of some undercover technique and the number of actual drug prosecutions runs annually in the thousands, the requirements of subsections 3805(b)(9) and (10), which require a separate entry for each arrest and indictment, would be staggering.

Second, this section would require information on terminated operations that had not yet resulted in arrest, indictment, or trial, and also information on any ongoing operation if it had been approved more than two years earlier. A major undercover operation may itself last longer than two years,[3] and, resulting trials and appeals much longer still. As I mentioned earlier, the Department of Justice is strongly opposed to requirements that we disclose in a public document information about an undercover operation prior to the conclusion of trial or termination of covert activity for the obvious reason that such disclosure would jeopardize investigations and prosecutions as well as the safety of government agents, informants, and cooperating witnesses and victims.

Finally, and perhaps most importantly, section 3805 would require the Attorney General to report on "all undercover operations." From the context, we assume that only Department of Justice operations are meant to fall within this requirement, and not those of other departments and agencies. If so, this limitation should be clarified. Even as so understood, however, It would appear that the FBI's counterintelligence undercover operations would be encompassed by this requirement. Clearly, national security matters should be excluded from any public report. Thus, we strongly urge that, if the Subcommittee decides to process legislation in this area, the term "undercover operation" as used throughout the bill be defined to exclude foreign counterintelligence operations of the FBI.

PART II. ENTRAPMENT

Section three of the bill would for the first time establish a statutory entrapment defense as a new section 16 in title 18. Although Congress undoubtedly possesses the power to define the entrapment defense,[4] the fact that it has heretofore declined to do so reflects, in our view, a wise decision that the law in this area as developed by the federal courts in hundreds of cases over many years properly balances the interests of law enforcement and privacy. Indeed, this was the judgment of the Senate Judiciary Committee, only a little more than two years ago, when it determined to retain the prevailing court-developed entrapment defense in the context of approving the Criminal Code Reform Act (S. 1630).[5]

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[3] For example, a major RICO and narcotics trafficking case recently considered by the Second Circuit resulted from a six year investigation of the Bonanno organized crime family, almost all of which was undercover. See *United States v. Ruggiero*, 726 F.2d 913 (2d Cir. 1984).

By contrast, the defense to be placed in the statute books by S. 804 would abandon the current law of entrapment and would substitute a version of the defense that the Supreme Court has repeatedly repudiated on the ground that it would benefit professional, hard core criminals while providing no greater protection to the average law-abiding citizen. The Supreme Court's decisions rejecting the type of formulation of entrapment proposed in S. 804 involve several cases spanning nearly fifty years and do not reflect the thinking of only a particular group of justices.[6]

Since we have concluded that the interests of law enforcement would be gravely damaged by enactment of the conflicting version of the defense proposed in S. 804, the Department of Justice strenuously opposes this aspect of the bill.

Under current case law, it is recognized that merely affording a person an opportunity or the means to commit a crime does not constitute entrapment, and the courts have further upheld and noted the necessity of using undercover techniques such as infiltration of organized groups and general "artifice and strategem" to catch those engaged in criminal enterprises.[7] The key element of the existing entrapment defense surrounds the issue of inducement. The defense of entrapment is met if the facts show that the defendant was an otherwise innocent person whom the government, through the creative activity of its officials, caused to commit the crime. Thus, when the government provides some inducement to an individual to commit an offense, as it frequently must in the course of underover operations, the government must establish that the individual was "predisposed" towards the criminal activity. This in turn involves a subjective inquiry into the defendant's inclination to commit the crime, and permits evidence to be introduced, e. g., demonstrating that the defendant was not an ordinary law-abiding citizen suddenly confronted by overwhelming temptations offered by law enforcement officials to commit an offense, but instead was seeking to engage in criminal activities, for which the government agents merely provided the means or opportunity. In other words, the present formulation of the entrapment defense focuses, appropriately, on the guilt or innocence of the defendant and seeks to determine his or her state of mind ("predisposition") at the time the challenged inducements were made.

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[4] See United States v. Russell, 411 U.S. 423 (1973).

[5] See S. Rep. No. 97-307, 97th Cong., 1st Sess., pp. 118-130.

[6] See Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958); Lopez v. United States, 373 U.S. 427 (1963); Osborn v. United States, 385 U.S. 323 (1966); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976).

S. 804 would substitute for this long-standing "subjective" test an "objective" test. Under the bill's proposed defense, the standard for entrapment would be whether the defendant's actions were induced by the government's use of "methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense." In applying this test, the predisposition of the defendant to commit the crime would be irrelevant.

Such a recasting of the entrapment defense would mean, for example, that an established narcotics dealer with several prior convictions could not be convicted of drug smuggling if he convinced a jury that the purchase price offered by an undercover agent would have been sufficient to cause a "normally law-abiding citizen" to commit such an act. But in order to accomplish an undercover drug buy, agents must offer the going price, which may represent a huge profit to the defendant. The fact that a jury of normally law-abiding citizens might find the routine profit on a large scale drug deal so shockingly high as to perhaps have tempted them to commit the crime should not allow the acquittal of an experienced trafficker. Yet the "objective" test in S. 804 opens the door to this unjust result. As the Supreme Court observed, in rejecting the invitation to adopt an "objective" entrapment test, it does not "seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because governmental undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed."[8]

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[7] United States v. Russell, supra; Sorrells v. United States, supra.

In sum, to legislatively establish the objective test for entrapment would serve no purpose other than to provide a windfall to wrongdoers who would be currently foreclosed from successfully asserting an entrapment defense because of their predisposition to commit the offense. If a "normally law-abiding citizen" is induced by the government to commit an offense, he can now defend the charges by showing lack of predisposition. Adoption of the objective test would benefit experienced criminals and provide no additional protection to the law-abiding citizen.

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[8] United States v. Russell, supra, 411 U.S., at 434. To put the matter another way, as stated by Judge Learned Hand in a passage frequently cited with approval by the Supreme Court: "Indeed, it would seem probable that, if there were no reply [by the government to the claim of inducement], it would be impossible ever to secure convictions of any offenses which consist of transactions that are carried on in secret." United States v. Sherman, 200 F.2d 880, 882.

As if this were not enough, this section of the bill in addition to adopting the "objective" test, would create three highly objectionable irrebuttable presumptions which the defendant could use to establish a per se entrapment defense.

The first of these presumptions would be triggered if the defendant commits the crime because the government threatens harm to the person or property of any individual. We agree that in such a case conviction generally should be barred. But the provision is extremely broad and could have unforeseen effects. For instance, in the midst of negotiations over a major narcotics sale, an undercover agent may have to "talk tough" or "threaten" an experienced street-wise seller who was attempting to renege on the deal or change its terms, in order for the agent to complete the transaction, maintain his credibility, or protect himself or others from harm. In the world of narcotics trade, such conduct in neither unreasonable nor unusual.

Also, the presumption contains no requirement that the defendant even be aware of the threatened "harm" to another individual. Thus, the presumption could apply where agents threatened prosecution of a low level participant in a drug ring when he attempted to back out on an agreement to proceed with a purchase from the defendant. With the defendant not even aware of, much less influenced by, the pressure applied to the intermediary, there is no reason for him to be able to assert entrapment as a matter of law for a crime in which he willingly participated. Again, current law is adequate to protect innocent persons. Courts can consider duress as a defense, and can weigh government conduct against predisposition.

The second presumption would establish entrapment as a matter of law if the government "manipulated the personal economic, or vocational situation of the defendant...." This provision is extremely vague and, if broadly construed, could be read to prohibit the offering by an undercover agent of a bribe to a predisposed corrupt official. Moreover, every narcotics purchase represents some manipulation of the "economic situation" of those who participate, no matter how willingly. While we assume that some narrower interpretation was intended for this language, the fact is that this presumption offers numerous loopholes to be exploited by defendants, and the government would be powerless to rebut the presumption regardless of the defendant's criminal record or predisposition to commit the offense, or the reasonableness of the inducement in a particular case.

The third presumption would apply if the government provided goods or services necessary to the commission of the crime that the defendant "could not have obtained" without the government's help. This provision would overturn Supreme Court cases holding that the supplying of contraband or hard to obtain services to predisposed drug traffickers does not constitute entrapment.[9] Thus, this provision would cast doubt on the accepted and reasonable practice of a government agent's supplying limited amounts of contraband to show good faith or establish credibility with targets of an investigation. Moreover, it would seem to preclude a sale by an undercover agent of classified defense information or controlled high technology to a person who had amply demonstrated his desire to make such a purchase. This provision, like the other two presumptions, could bar the use of reasonable undercover techniques and allow acquittal of experienced, predisposed criminals without providing any additional protection to innocent citizens.

In short, Mr. Chairman, I urge the Subcommittee not to alter the entrapment defense as it has been developed by the courts. The proposed change would cause much harm to legitimate and necessary law enforcement operations and would wrongly shift the focus of the trial from an inquiry into the facts of the crime -- that is, was the particular defendant predisposed to commit the offense or did the police implant in his mind the idea of committing it -- to a general inquiry into police investigative techniques and how they might affect a hypothetical citizen.

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[9] See United States v. Russell, supra; Hampton v. United States, supra.

In conclusion, the Department of Justice is opposed to any change in the law of entrapment for the reasons I have just outlined. We are also opposed to section 3803, which would regulate by statute the initiation of undercover operations and the offering of an inducement to commit a crime, and to section 3804 which would create a new tort liability of the United States for conduct connected with an undercover operation. We support the substance of section 3802 dealing with certain fiscal aspects of undercover operations provided the suggested minor changes mentioned in my statement and in our earlier report on the bill are made but we believe these provisions are more properly considered in the context of the Department's authorization bill. Finally, we object to many of the provisions of sections 3801 and 3805 requiring, respectively, Justice Department guidelines for the conduct of undercover operations and reports to the Congress.

Mr. Chairman, that concludes my prepared statement and I would be happy to try to answer any questions the Members of the Subcommittee may have.

RESPONSES BY ASSOCIATE ATTORNEY GENERAL JENSEN TO QUESTIONS SUBMITTED BY SENATOR CHARLES MCC. MATHIAS, JR.

REPORTING REQUIREMENTS

Question No. 1. As I noted in my opening statement, the reporting requirements contained in S. 804 have, to a limited degree, been superseded by the provisions of P.L. 98-166, the Justice Department appropriations bill for fiscal year 1984. That statute calls for increased reporting by the FBI on undercover operations, especially those involving "sensitive circumstances" under the FBI guidelines.

Since fiscal year 1984 is not yet over, it may be too early to evaluate the impact of these new reporting requirements. But is there any reason to think at this point that these reporting requirements are unduly burdensome? Given the problems that the Justice Department perceives with the reporting requirements of S. 804, would it be useful to pattern any legislation in this area on the framework set up in P.L. 98-166: that is, focusing on the "sensitive circumstances" operations, and excluding foreign counterintelligence operations?

Would you anticipate any difficulties in extending to DEA and INS the undercover operations reporting requirements contained in P.L. 98-166? (I note that the fiscal year 1985 appropriations bill applies the reporting requirements to DEA.)

Response to question No. 1. The FBI undercover reporting requirements of Public Law 98-166 have been carried forward and extended to the Drug Enforcement Administration in the 1985 Appropriations Act, Public Law 98-411. Although we believe these reporting requirements should be cut back, particularly the third report item, the existing report requirements are in our view preferable to those proposed in S. 804.

Pursuant to Sec. 203(b) of Public Law 98-411, reports to the Attorney General and Comptroller General are required to describe the circumstances involving the liquidation, sale, or other disposal of an FBI or DEA undercover proprietary corporation or business entity with a net value of over $50,000.

A second report under Sec. 203(b)(4)(A) of Public Law 98-411 must include a detailed financial audit of each undercover operation which is closed in Fiscal Year 1985, provided the operation either generated gross receipts in excess of $50,000 or had expenditures exceeding $150,000 and which involves an exemption to establish a proprietary, deposit appropriated fund in a financial institution or to use the proceeds of the undercover operation to offset expenses.

The last part of the third report requirement directs reporting of the results of all closed undercover operations, i.e., prosecutive proceedings completed or covert activities concluded, whichever occurs later. Because there is normally a significant time interval between the completion of covert activities in a case and the completion of prosecutive proceedings, it will be very rare that all prosecutive accomplishments will be known in the same fiscal year in which the covert phase of the case was concluded. The FBI intends, therefore, to provide the Congress with comprehensive data on accomplishments of all undercover activities broken down by category of case (e.g., organized crime, etc.) and fiscal year. This approach will, we believe, provide the Congress with the most meaningful information possible. In addition, the FBI will furnish statistics on the number of undercover operations opened, pending and terminated during each fiscal year broken down both by category of case (i.e. organized crime, etc.) and sensitivity of covert techniques employed (i.e. Group I or Group II cases).

As virtually every DEA case involves some undercover element, the DEA report will reflect all sensitive undercover activities requiring headquarters approval. Thus the DEA report will be similar to that supplied by the FBI even though the FBI and DEA guidelines vary in their definitions of undercover operations, a variation reflecting the differing missions of the two agencies.

Because of the substantial administrative burden involved in complying with the third report requirement of the appropriations acts, reporting in our view should be limited to cases involving operations which have generated gross receipts in excess of $50,000 (excluding interest); having expenditures exceeding $150,000; or involving sensitive circumstances.

NON-LEGISLATIVE RECOMMENDATIONS

Question No. 2. The Senate Select Committee on Undercover Operations, in addition to the legislative recommendations embodied in S. 804, recommended some changes in the FBI undercover guidelines, and in internal FBI directives having to do with undercover operations. These recommendations included (1) clearer definitions of some terms used in the guidelines, (2) review by the Undercover Operations

Review Committee of decisions made by field offices to approve undercover operations, (3) more detailed instructions to undercover agents, and (4) better monitoring of agent compliance with FBI directives.

What has been the response of the Department and of the Bureau to these recommendations? Have any of these proposed changes been adopted?

Response to question No. 2. First. As to definitions of terms used in the FBI Guideline, the term "undercover employee" is defined on page one of the Attorney General's Guidelines on FBI Undercover Operations as "any employee of the FBI or employee of a Federal, state, or local law enforcement agency working under the direction and control of the FBI in a particular investigation whose relationship with the FBI is concealed . . . by the maintenance of a cover or alias identity." This definition along with the Attorney General's Guidelines on Informants and Confidential Sources clearly differentiates the role of an informant or a middleman from that of an undercover employee. The Attorney General's Guidelines on FBI Use of Informants and Confidential Sources, page one, captioned "Introduction," states that ". . . informants and confidential sources are not employees of the FBI. . . ." Furthermore, middlemen who are not aware they are dealing with the FBI are neither informants nor employees.

By the Director's letter to the Attorney General dated July 20, 1981, "public official" was defined as an individual elected or appointed to a high-level administrative or executive position in a governmental entity or political subdivision thereof. The July 20, 1981, letter further specified positions which are considered as being included in the term "public official." This definition was established to preclude the presentation to and review by the Criminal Undercover Operations Review Committee of each activity involving low-level Federal, state or local Government employees.

Investigation, however, of low-level Government employees must be approved by the Special Agent In Charge (SAC) of a field division with the concurrence of the United States Attorney or other appropriate Federal prosecutor. Timely notification to FBIHQ of all such investigations is required. Furthermore, FBIHQ approval for the payment of bribes to "public officials" and/or the payment of $2,500 or more for bribes to any level of government employee is required.

The recommendation that the terms "investigation," "inquiry," and "routine investigative interview" be defined with greater precision appears directly related to the wording in Section K of the Attorney General's Guidelines on FBI Undercover Operations. Section K might be more properly placed in the Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations since this section governs all pretextual interviews and not just those in undercover operations. During discussions with James Neal, Counsel for the Senate Select Committee, Mr. Neal commented that Section K did not appear to belong in the Attorney General's Guidelines on FBI Undercover Operations.

The definition of "informant" is adequately expressed in the Informant Guidelines. The Senate Report recommendation would require the definition of "informant" to be redefined based solely on the nature of the person's activities and not on whether the person has been approved or disapproved as an informant. This could qualify a cooperating businessman, banker, cooperating victim, confidential source of information, or even an unknowing middleman (as in Abscam) as an informant since all could and do furnish information or services to the FBI.

Strict criteria are currently in effect with respect to initiating and supervising an informant, including suitability and pertinence inquiries, travel notifications, and contract requirements. With a redefinition, these provisions may well become applicable to every cooperating victim, businessman, and cooperating witness/subject whether or not the operation of such an individual involved any undercover activity.

A significant danger here is the potential for a "middleman," involved in the illegal activity and being utilized (without his knowledge) by the FBI to introduce Undercover Agents to other subjects, being classified as an informant. This could potentially eliminate a necessary technique in corruption and organized crime investigations.

Finally, the working group that is reevaluating the Undercover Guidelines is considering the need for the clarification of certain other definitions.

Second. As to review by the Criminal Undercover Operations Review Committee of decisions made by field offices to approve undercover operations, the recommendation in the Senate Report that a copy of every written application for SAC approval of undercover operations be provided to and reviewed by the Criminal Undercover Operations Review Committee within 20 days of the SAC's approval would unnecessarily expand the role of the Criminal Undercover Operations Review Committee. Nonsensitive undercover investigations are adequately controlled under the current system of approval by the SAC and the other requirements for close supervision by management in the field and FBI Headquarters. It has not been demonstrated that there is a need for such a significant change.

The Criminal Undercover Operations Review Committee has been established to serve in an advisory capacity for long term and/or sensitive undercover operations. The Committee, which is comprised of high-level management officials of the FBI and the Department of Justice, is not intended nor designed to be involved in the day-to-day management of operations. To require the Committee to review all undercover operations regardless of their complexity and sensitivity would dilute the effectiveness of the Committee with no corresponding benefit to the already adequate management procedures of the FBI and the Department of Justice.

Third. As to the suggestion that there is a need for more detailed instructions to undercover Agents, the Senate Report recommendation on this point would result in duplicative and lengthy administrative directives. The materials recommended in the report are already in the possession of field officials. All Special Agents have been furnished copies of the Attorney General's Guidelines. Principal Legal Advisors and Undercover Coordinators have been provided training and materials regarding all legal, policy, and administrative guidelines and regulations pertaining to undercover operations. These individuals are responsible for furnishing instruction and advice to all personnel involved in undercover operations. The Manual of Investigative operations and Guidelines contains guidelines and regulations concerning electronic surveillance and consensual monitoring. Communications to the field have supplemented the Manual of Investigative Operations and Guidelines' provisions concerning these matters.

Extensive training has been and will continue to be furnished to the undercover coordinators, operatives, and supervisors under the direction of the Undercover and Special Operations Unit. The Undercover and Special Operations Unit has prepared a manual on undercover operations and this has been furnished to supervisory personnel, undercover coordinators, and other appropriate personnel in the field and at FBI Headquarters.

As to monitoring of Agent compliance with FBI directives, the monthly report recommended in the Senate Report would again be lengthy and duplicative of the monthly report each field office currently furnishes. Additionally, field officials correspond regularly with FBI Headquarters concerning undercover operations and are required to furnish periodic summaries of all investigative activity. Any significant change in focus of the undercover operation or any investigative activity involving certain fiscal and sensitive circumstances not reviewed and previously recommended for approval by the Criminal Undercover Operations Review Committee to the Assistant Director in Charge of the Criminal Investigative Division, or in certain circumstances the Director, must immediately be brought to the attention of FBI Headquarters. Before the undercover operation can proceed with the investigative activities in question, review by the Criminal Undercover Operations Review Committee is required and the undercover operation must be reauthorized by the Assistant Director, Criminal Investigative Division or the Director. Therefore, a monthly report as recommended in the Senate Report is unnecessary and would merely duplicate and add to the extensive documentation the field must now submit to FBI Headquarters. A copy of the monthly report format is attached for ready reference.

FILE CAPTION

IDENTITY OF DIVISION
DATE PREPARED

CODE NAME
OR
CODE TITLE

PERTINENT MONTH

1. Designation and date approved:
   a. Group I operation approved by FBIHQ on (Date)
   b. Group II operation approved by SAC on (Date)
   c. Other investigation approved by SAC on (Date)

2. Exemptions obtained:
   a. Deposit funds in banks on (Date)
   b. Use funds to lease space on (Date)
   c. Use income to offset expenses on (Date)

3. Program under which operation/investigation is supervised at FBIHQ: (OC, WCC, GPCP, TER)

4. Field office file number:

5. Bureau file number:

6. Type: a. FBI
   b. FBI/Local
   c. FBI/Other Federal

7. Funding:	Current Month	Total To Date
a. FBI funds authorized (by SAC/FBIHQ) (excluding show money/assets)		
b. FBI funds expended (vouchered)		
c. FBI show money/assets provided		

8. Payment to (A) informants (identify by symbol #), (B) sources or (C) coop. witnesses:	Current Month	Total To Date
a. In Group I UCOs: (with FBIHQ funds under Category E)		
b. In Group II UCOs: (with FSA funds under Category A)		
c. In other investigations: (with FSA funds under Category A)		
d. Lump sum: (with FBIHQ funds under Category A)		

9. Statistical Accomplishments During Current Month:

	Arrests	Convictions	Recoveries/ Savings	Potential Economic Loss Prevented
a. FBI				
b. Local				
c. Other Fed.				

10. Incorporation of undercover business: _______Yes _______No

11. Gross Income Generated:

	Current Month	Total To Date
a. Business		
b. Interest		

12. Proprietary disposition anticipated: (if applicable furnish details)

13. Covert Activity: Ongoing or Ceased

14. Personnel utilized during Current Month:

UCA's (Identify)	Support Agents (# only)	Clerical Support (# only)

15. Succinct summary of:

1. Significant meetings, payoffs, buys or bribes involving designated targets
2. Prosecutable cases developed
3. New targets developed
4. Additional techniques utilized (informant, surveillance, pen register, Title III, search warrant, etc)

#14 and #15 should be set forth on a separate page so that it can be easily detached prior to dissemination of the fiscal data to the Administrative Services Division and Technical Services Division.

"WORKING GROUP" ON FBI UNDERCOVER GUIDELINES REVISION

Question No. 3. Judge Webster, when do you expect to receive the recommendations of the working group that is now re-evaluating the undercover guidelines? Is there any timeframe for implementation of the working group's recommendations? At an appropriate point in the process, will you share with the subcommittee the conclusions of the working group?

Mr. Jensen, is any similar project underway within the Justice Department, or any of its law enforcement components, to re-evaluate undercover practices in light of the recommendations of the Senate Select Committee, or to consider other changes? If so, please describe the review that is being undertaken, and the schedule for implementation of any resulting recommendations.

Response to question No. 3. The FBI review of its guidelines is continuing with a view toward a comprehensive Department analysis of undercover operations later this year. In the meantime, it should be noted that DEA completed a lengthy review of its undercover operations in light of the FBI program. As a result of that process, requirements for Headquarters review of an expanded list of DEA field activities was established on May 9, 1984. The established guidelines describe reporting and approval requirements for what are defined as "Sensitive Investigative Activities" (SIA). These DEA activities compare with those operations of the FBI which are controlled by its "Undercover Guidelines" and Undercover Operations Review Committee (UORC). Since the expanded DEA guidelines on undercover operations have only been in effect a short time, and as no problems have surfaced as a result, DEA has not undertaken a re-evaluation of these practices.

COUNTERING THE BUREAUCRATIC INCENTIVES TOWARD AGGRESSIVE UNDERCOVER OPERATIONS

Question No. 4. Judge Webster, the courts have long recognized that law enforcement agents, who are actively engaged in the pursuit of criminals, are not always able to view the facts objectively and come to dispassionate conclusions about the balance between law enforcement and individual rights. The FBI guidelines recognize this phenomenon too, by requiring that some of the more sensitive decisions regarding undercover operations must be made, not at the field level, but by officials a step removed from the enterprise itself. However, there may also be institutional limitations which make it difficult even for headquarters to weigh all the circumstances with the greatest objectively possible. Many commentators have discussed these bureaucratic incentives that encourage a more and more aggressive use of the undercover technique, and discourage the official who would try to halt an unproductive or counterproductive operation.

Undercover work is more attractive to many agents than other duties that agents engage in. It holds out the possibility of the "big case," the Abscam or the Delorean affair, the kind of case on which reputations may be built and careers boosted. And once an undercover operation is underway, there is a natural tendency to keep on with it until something resembling a case is made. Rarely to bureaucracies reward the nay-sayer, even if nay needs to be said.

I'm sure you are aware of these institutional facts of life, and of the charges that they have frustrated the Bureau's attempt to insulate decisions from a pro-undercover bias by holding them at headquarters level. What is the FBI doing to counteract these understandable but unfortunate bureaucratic imperatives? Do you think that a clear statement from congress of the standards that ought to be applied would help to increase the objectivity of the decisionmaking process?

Response to question No. 4. The objectively of the decisionmaking process regarding undercover operations must always be preserved. The courts have recognized that law enforcement agents engaged in the pursuit of criminals may lose some of their objectivity. The courts, therefore, carefully scrutinize the manner in which law enforcement agents gather evidence. The undercover activities of the FBI have been closely scrutinized, and the courts have consistently found the FBI's use of the undercover technique to be in conformity with constitutional requirements.

To ensure that the FBI undercover operations continue to be authorized and conducted in a lawful manner, the Attorney General's Guidelines on FBI Undercover Operations were issued in 1980. In addition, the Director has implemented extensive review and control procedures within the FBI.

All undercover operations, once approved, are constantly monitored in the field. Monthly reports summarizing the undercover activity and funds expended are required to be submitted to FBIHQ. Some operations necessitate more frequent reports and monitoring by FBI Headquarters. FBI Headquarters is apprised of major events in the undercover operations by telephone or teletype. FBI Headquartrs accounting personnel conduct yearly fiscal audits of undercover operations and Supervisory Special Agent Accountants conduct quarterly audits in the field. Finally, periodic onsite evaluations are conducted of all long-term undercover operations by FBIHQ supervisory personnel.

FBI Agents involved in undercover operations receive extensive training, are required to report regularly to supervisory personnel as to their activities and are subject to careful management oversight by both field and headquarters supervisors. These training, reporting and management requirements are probably the most rigorous of any law enforcement agency in the nation and protect against excesses on the part of individual undercover agents.

These extraordinary administrative controls, coupled with the close scrutiny the courts exercise, serve to ensure objectivity. Every Agent in the FBI knows that undercover activities are subject to strict review, internally and by the courts and the Congress. This factor overcomes any pro-undercover bias that may otherwise exist.

As the Director testified before the Subcommittee on May 16, 1984, we believe that standards applied to undercover operations are best established through the Attorney General's Guidelines and corresponding internal FBI rules and regulations. The advantage of the Guidelines is that they provide the flexibility to permit appropriate responses to specific investigative situations. Investigative guidelines provide the flexibility to deal with changing situations while at the same time observing fundamental constitutional guarantees.

Furthermore, we are concerned that notwithstanding proposed Sec. 3803(e), which states that "failure to comply with the provisions of this section shall not provide a defense in any criminal prosecution or create any civil claim for relief," standards established by statute may produce endless litigation and drastically reduce our ability to conduct undercover operations. The Department of Justice does not believe that the need for such drastic action has been demonstrated.

NON-FBI OPERATIONS

Question No. 5. Mr. Jensen, I am pleased to learn from your testimony that undercover guidelines are now in effect for operations of the Drug Enforcement Administration and the Immigration and Naturalization Service. As you know, when the Select Committee concluded its investigation, DEA had only limited guidelines and INS had none. As late as last summer, when the Judiciary Committee held a confirmation hearing for DEA Director Mullen, the DEA had not yet established an Undercover Operations Review Committee. Your testimony indicates that INS guidelines were adopted only about two months ago.

Do the guidelines for DEA and INS parallel those that have been in force for FBI for more than three years? Specifically, do they provide the same standards for initiating and redirecting undercover operations, and the same kind of internal administrative structure that includes an Undercover Operations Review Committee to decide the most sensitive questions?

Will you please provide the subcommittee with a copy of these DEA and INS guidelines?

In your view, are any other components of the Justice Department, other than FBI, DEA and INS, currently authorized to conduct undercover operations?

In 1982 the Judiciary Committee issued a staff report concerning a situation in which the FBI ran an undercover investigation targeted at an informant for the office of the U.S. Attorney for the Southern District of New York. Leaving aside the problem of coordinating the two investigations, does a U.S. Attorney's office have authority to employ an informant independently of the efforts of the FBI or another federal law enforcement agency? If so, does the U.S. Attorney's office have authority to run an undercover operation?

Response to question No. 5. The Guidelines adopted for the INS are generally patterned after the FBI Undercover Guidelines, with differences reflecting the different organizational structures and the different investigative jurisdictions of the investigative agencies. Each set of Guidelines utilizes an Undercover Operations Review Committee to review particularly sensitive proposed undercover operations. A copy of the INS Guidelines is attached.

The DEA Guidelines predate the FBI Guidelines and do not follow the organization of the FBI Guidelines because of the much narrower focus of DEA undercover investigations (limited to large-scale trafficking of drugs) and the much simpler scope and structure of most DEA undercover operations to date.

The DEA Guidelines provide for an undercover review process which accomplishes the same purpose as the Undercover Review Committees of the FBI and INS. The process requires high-level Headquarters review and approval for those undercover operations which involve complex or Sensitive Investigative Activities (SIA). Additionally, these operations are each coordinated with the appropriate U.S. Attorney's Office.

The DEA Headquarters review process has recently been expanded to include additional activities. Attached is a May 9, 1984 DEA memorandum, now incorporated in the latest DEA Agents Manual edition, which sets forth these SIAs and the required Headquarters review process for each. As the attachment indicates, any undercover operation that involves an SIA must be approved by the appropriate Operation Division Section Chief, the Deputy Assistant Administrator for Operations, the Chief Counsel; and depending upon the sensitivity of the situation, the Assistant Administrator for Operations, the Deputy Administrator and/or the Administrator. Additionally, depending upon the nature of the operation, Headquarters managers over accounting, contracting, and/or laboratory operations may be included in the process.

Undercover operations are a necessary and lawful tool in the investigation of federal crime. Organizations authorized by statute or order of the Attorney General to conduct investigations may, in appropriate circumstances, utilize the technique even if no formal Guidelines are in effect.

The United States Attorney, within his or her district, has plenary authority with regard to federal criminal matters, exercised under the supervision and direction of the Attorney General. The statutory duty to prosecute offenses against the United States carries with it the authority necessary to perform this duty, including the authority to supervise criminal investigations. Normally the U.S. Attorneys' Offices utilize the investigative resources of the federal investigative agencies, but some Offices have on occasion employed investigators and information analysts to assist with various aspects of the criminal justice system. U.S. Attorneys do not, however, maintain informants in the traditional sense that informants are used by investigative agencies, i.e., private individuals who furnish information to law enforcement authorities on a confidential basis with some degree of regularity. Of course, individuals who come forward to provide information of criminal activity occasionally do so by going directly to United States Attorney's office rather than the FBI or other investigative agency. We do not consider such an individual to be an "informant" as that term is normally used in the law enforcement field.

Office of the Attorney General
Washington, D.C. 20530

ATTORNEY GENERAL'S GUIDELINES ON INS UNDERCOVER OPERATIONS

I. INTRODUCTION

The Immigration and Naturalization Service's (INS's) use of undercover operations is a lawful and essential technique for the detection and investigation of alien-smuggling conspiracies, fraudulent document offenses, and other violations of federal law within the jurisdiction of the INS. Since this technique inherently involves an element of deception and occasionally requires a degree of cooperation with persons whose motivation and conduct are open to question, it should be carefully considered and monitored.

Definitions

A "cooperating private individual" is a person who is not employed by the INS but whose activities are directed by an INS employee.

"Otherwise illegal activity" is activity that would constitute a crime under federal, state, or local law if engaged in by a person acting without approval or authorization of an appropriate Government official.

An "undercover employee" is any employee of the INS -- or employee of a federal, state, or local law enforcement agency working under the direction and control of the INS in a particular investigation -- whose relationship with the INS is concealed from third parties in the course of an investigative operation by the maintenance of a cover or alias identity.

An "undercover operation" is any investigative operation in which an undercover employee or cooperating private individual is used.

A "proprietary" is a sole proprietorship, partnership, corporation, or other business entity owned or controlled by the INS which is used in connection with an undercover operation when the entity's relationship with the INS is not generally acknowledged.

II. GENERAL AUTHORITY

The INS may conduct undercover operations pursuant to these guidelines when such operations advance the enforcement of criminal statutes assigned to the investigatory jurisdiction of the INS or when otherwise appropriate to carrying out the Service's investigative function.

Under this authority, the INS may participate in joint undercover operations with other federal, state, and local law enforcement agencies; may seek operational assistance for an undercover operation from any suitable informant, confidential source, or other cooperating private individual; and may operate a proprietary on a commercial basis to the extent necessary to maintain an operation's cover or effectiveness.

III. AUTHORIZATION OF UNDERCOVER OPERATIONS

All undercover operations under these guidelines fall into one of three categories: (1) those undercover operations which must be authorized by the INS Commissioner with the concurrence of the Assistant Attorney General for the Criminal Division; (2) those which must be authorized by the appropriate Regional Commissioner; and (3) those which must be approved by the appropriate District Director or Chief Patrol Agent. In general, the graver the risk of harm or intrusiveness, the higher the approval level required. Of course, in planning an undercover operation, these risks of harm and intrusion will be avoided whenever possible unless such avoidance would unduly interfere with obtaining evidence in a timely and effective manner.

IV. CATEGORIES OF UNDERCOVER OPERATIONS

A. Undercover Operations which Must Be Authorized by the Commissioner of the INS with Concurrence of the Assistant Attorney General for the Criminal Division

Subject to the emergency authorization procedures set forth below, undercover operations involving sensitive circumstances must receive prior approval of the Commissioner of the INS or the Associate Commissioner for Enforcement with the concurrence of the Assistant Attorney General for the Criminal Division or his or her designee. For the purposes of these guidelines, an undercover operation involves sensitive circumstances if there is a reasonable expectation that:

(1) The undercover operation will concern an investigation of possible corrupt action by a public official or political candidate, the activities of a foreign government, the activities of a high foreign government official, the activities of a religious or political organization, or the activities of the news media;

(2) An undercover operation will be conducted substantially outside the United States (an operation is not conducted substantially outside the United States if its only extraterritorial conduct will consist of contacts within immediate border areas with principals when such contacts are necessary to maintain the credibility, cover, or safety of the undercover employee or cooperating private individual);

(3) An undercover employee or cooperating private individual will be a major participant in the scheme to move or transport aliens illegally across an international border;

(4) An undercover employee or cooperating private individual, during the undercover operation, will make false or misleading representations about the activities of a third person who is not involved in and does not share any guilt for the activities which are the subject of the investigation, and there is a reasonable possibility that the false or misleading representations may cause significant embarrassment or physical or financial harm to the third person;

(5) An undercover employee or cooperating private individual will engage in any otherwise illegal activity which would be proscribed by federal, state, or local

law as a felony or which would be otherwise a serious crime -- except for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens;

(6) An undercover employee or cooperating private individual will seek to supply an item or service, other than the supplying of documents, that would be reasonably unavailable to criminal actors but for the participation of the Government;

(7) An undercover employee or cooperating private individual will run a significant risk of being arrested for other than minor traffic violations but will nevertheless seek to continue in an undercover capacity;

(8) An undercover employee or cooperating private individual will be required to give a sworn statement or testimony in any judicial proceeding in an undercover capacity;

(9) An undercover employee or cooperating private individual will attend a meeting between a subject of the investigation and his or her lawyer;

(10) An undercover employee or cooperating private individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will be led into a professional or confidential relationship with the undercover employee or cooperating private individual as a result of the pose;

(11) An undercover employee or cooperating private individual will make a request for information to an attorney, physician, clergyman, or other person who is under the obligation of a legal privilege of confidentiality, and the particular information would ordinarily be privileged;

(12) An undercover employee or cooperating private individual will make a request for information to a member of the news media concerning any individual with whom the newsperson is known to have a professional or confidential relationship;

(13) There may be significant risk of violence or physical injury to an individual or a significant risk of financial loss to an innocent individual;

(14) The undercover operation will require the use of appropriated funds to establish, acquire, or operate a proprietary; or

(15) The undercover operation will require the deposit of appropriated funds or proceeds generated by the undercover operation in banks or other financial institutions. (Absent statutory authorization, such proceeds must be promptly deposited in the United States Treasury and may not be used to offset the expenses of the undercover operation. Proceeds may be deposited in banks or other financial institutions as part of a process leading to the prompt deposit of such funds in the Treasury.)

B. Undercover Operations which Must Be Authorized by the Appropriate Regional Commissioner

An undercover operation involving activity in more than one region but not involving a sensitive circumstance listed in paragraph A, above, can be authorized, extended, renewed, or modified by the appropriate Regional Commissioner with notification to the Associate Commissioner for Enforcement. In order to authorize, extend, renew, or modify such an undercover operation, the appropriate Regional Commissioner must approve a written proposal that:

(1) Summarizes the proposed undercover operation and shows that there are facts or circumstances that reasonably indicate that a federal crime, which is within the investigatory jurisdiction of the INS, has been, is being, or will be committed;

(2) Shows why the proposed undercover operation appears to be an effective means of obtaining evidence or necessary information; included should be a statement of what prior investigation has been conducted and what chance the operation has of obtaining evidence or necessary information concerning the alleged criminal conduct or criminal enterprise;

(3) Indicates that the undercover operation will be conducted with the minimal intrusion which is consistent with the need to collect the evidence or information in a timely and effective manner;

(4) Indicates that there is no present expectation of the occurrence of any of the circumstances listed in paragraph A, above;

(5) Indicates that any foreseeable participation by an undercover employee or cooperating private individual in otherwise illegal activity which can be approved by the Regional Commissioner on his or her own authority (i.e. the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens) is justified by the factors noted in paragraph V(F)(1), below; and

(6) Includes a statement that the District Director or the Chief Patrol Agent or his or her designee contacted the affected United States Attorney or Strike Force Chief, or his or her designee, and sets out fully the position of the Office of the United States Attorney or Strike Force Chief.

C. Undercover Operations which May Be Approved by the Appropriate District Director or Chief Patrol Agent

The appropriate District Director or Chief Patrol Agent may authorize the establishment, extension, renewal, or modification of all undercover operations which do not require approval by the Commissioner or Regional Commissioners. In order to authorize, extend, renew, or modify an undercover operation, the appropriate District Director or Chief Patrol Agent must approve a written proposal which includes all the information required by paragraph B, above.

D. Emergency Authorization

Notwithstanding any other provision of these guidelines, any District Director or Chief Patrol Agent who reasonably determines that:

(1) an emergency situation exists, requiring the establishment, extension, renewal, or modification of an undercover operation before an authorization mandated by these guidelines can with due diligence be obtained, in order to protect life or substantial property, to apprehend or identify a fleeing offender, to prevent the hiding or destruction of essential evidence, or to avoid other grave harm; and

(2) there are grounds upon which authorization could be obtained under these guidelines,

may approve the establishment, extension, renewal, or modification of an undercover operation provided that a written application is submitted in accord with the appropriate review procedures established elsewhere in these guidelines within 48 hours after the undercover operation has been established, extended, renewed, or modified.

In such an emergency situation, the District Director or Chief Patrol Agent shall attempt to consult by telephone with the United States Attorney or Strike Force Chief. If the proposed operation involves a sensitive circumstance specified in paragraph A, above, the District Director or Chief Patrol Agent shall also attempt to consult by telephone with the Associate Commissioner for Enforcement, and the Central Office shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of the operation if emergency authorization is granted. In the event that the subsequent written application for approval of an undercover operation involving a sensitive circumstance is denied, a full report of all activity undertaken during the course of the operation shall be submitted to the Commissioner who shall inform the Deputy Attorney General.

V. APPROVAL PROCEDURES

A. Approval by Central Office (Undercover Operations Review Committee and Commissioner or Associate Commissioner for Enforcement) with Concurrence of United States Attorney or Strike Force Chief When Sensitive Circumstances Are Present

The Commissioner of the INS or the Associate Commissioner for Enforcement must approve the establishment, extension, renewal, or modification of an undercover operation if there is a reasonable expectation that any of the circumstances listed in paragraph IV(A) may occur.

In such a case, the appropriate District Director or Chief Patrol Agent shall submit the application to the INS Central Office through the appropriate Regional Office. See paragraph B, below. The Central Office may either disapprove the application or recommend that it be approved. In cases in which the Central Office recommends approval, the application shall be forwarded to the Undercover Operations Review Committee. If approved by the Undercover Operations Review Committee, the application shall be forwarded to the Commissioner or the Associate Commissioner for Enforcement. See paragraph D, below. The Commissioner or Associate Commissioner for Enforcement may approve or disapprove the application.

B. Applications to the Central Office

(1) Each application to the Central Office from a District Director or Chief Patrol Agent recommending approval of the establishment, extension, renewal, or modification of an undercover operation involving circumstances listed in paragraph IV(A) shall be made in writing and shall include, with supporting facts and circumstances:

(a) A description of the proposed undercover operation, including the particular cover to be employed and any informants or other cooperating private individuals who will assist in the operation; a description of the criminal enterprise under investigation, and any individual known to be involved; and a statement of the period of time for which the undercover operation would be maintained;

(b) An inclusion of the information required by paragraph IV(B)(1)-(3) and a statement as to why it is believed traditional investigative techniques will not achieve the desired results;

(c) A statement concerning which circumstances specified in paragraph IV(A) are reasonably expected to occur, what the operative facts are likely to be, and why the undercover operation merits approval in light of the circumstances, including, for any foreseeable participation by an undercover employee or cooperating private individual in any otherwise illegal activity which would be proscribed by federal, state, or local law as a felony or which would be otherwise a serious crime -- except for the making of false representations to third parties in concealment of personal identity or true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens -- a statement why the participation is justified by the factors noted in paragraph F(1) below, and a statement of the federal prosecutor's approval pursuant to paragraph F(2) below;

(d) A statement concerning proposed expenses;

(e) A statement that the United States Attorney or Strike Force Chief is knowledgeable about the proposed operation, including the sensitive circumstances reasonably expected to occur; concurs with the proposal and its objectives and legality; and agrees to prosecute any meritorious case that is developed; and

(f) The date by which a response to the application is necessary, and a brief explanation of why a response is needed by that date.

(2) In the highly unusual event that there are compelling reasons for not advising either the United States Attorney or Strike Force Chief of the proposed undercover operation, the Assistant Attorney General in charge of the Criminal Division, or other Department of Justice attorney designated by him, may substitute for such person for purposes of any authorization or other function required by these guidelines. Where the Director or Chief Patrol Agent determines that such substitution is

necessary, the application to the Central Office shall include a statement of the compelling reasons, together with supporting facts and circumstances, which are believed to justify that determination. Such applications may only be authorized pursuant to the procedures prescribed in paragraph C, below, whether or not consideration by the Undercover Operations Review Committee is otherwise required, and upon the approval of the Assistant Attorney General in charge of the Criminal Division.

(3) An application for the extension, renewal, or modification of authority to engage in an undercover operation should also describe the results so far obtained from the operation or a reasonable explanation of any failure to obtain significant results and a statement that the United States Attorney or Strike Force Chief favors the extension, renewal, or modification of authority.

C. Undercover Operations Review Committee

(1) There shall be an Undercover Operations Review Committee, consisting of enforcement employees and such other appropriate employees of the INS as designated by the Commissioner and consisting of attorneys of the Department of Justice designated by the Assistant Attorney General in charge of the Criminal Division, to be chaired by the Associate Commissioner for Enforcement as the Commissioner's designee.

(2) Upon receipt by the Central Office of a request for approval of an undercover operation, the Committee will review the application. The Justice Department members of the Committee may consult with senior Department officials and the appropriate United States Attorney or Strike Force Chief as they deem appropriate. If the Committee concurs in the determinations contained in the application and finds that in other respects the undercover operation should go forward, see paragraph C(3) and (4), below, the Committee is authorized to recommend to the Commissioner or Associate Commissioner for Enforcement, see paragraph D, below, that approval be granted.

(3) In reviewing the application, the Committee shall carefully assess the contemplated benefits of the undercover operation together with its operating and other costs. In assessing the costs of the proposed undercover operation, the Committee shall consider, where relevant, the following factors, among others:

(a) The risk of harm to private individuals or undercover employees;

(b) The risk of financial loss to private individuals and businesses and the risk of damage liability or other loss to the Government;

(c) The risk of harm to reputation;

(d) The risk of harm to privileged or confidential relationships;

(e) The risk of invasion of privacy;

(f) The degree to which the actions of undercover employees or cooperating private individuals may approach the conduct proscribed in paragraph G, below; and

(g) The suitability of undercover employees' or cooperating private individuals' participating in activity of the sort contemplated during the undercover operation.

(4) The Committee shall examine the application to determine whether the undercover operation is planned so as to minimize the incidence of sensitive circumstances and to minimize the risks of harm and intrusion that are created by the circumstances. If the Committee recommends approval of an undercover operation, the recommendation shall include a brief written statement explaining why the undercover operation merits approval.

(5) The Committee shall recommend approval of an undercover operation only if a majority of its members agree, provided that:

(a) If one or more of the designees of the Assistant Attorney General in charge of the Criminal Division does not join in a recommendation for approval of a proposed undercover operation because of legal, ethical, prosecutive, or Departmental policy considerations, the designee shall promptly advise the Assistant Attorney General and there shall be no approval of the establishment, extension, renewal, or modification of the undercover operation until the Assistant Attorney General has had the opportunity to consult with the Commissioner;

(b) If, upon consultation, the Assistant Attorney General disagrees with a decision by the Commissioner to approve the proposed undercover operation, there shall be no establishment, extension, renewal, or modification of the undercover operation until the Assistant Attorney General has had an opportunity to refer the matter to the Deputy Attorney General or Attorney General.

(6) The Committee should consult the INS General Counsel's Office and the Office of Legal Counsel or other appropriate division or office in the Department of Justice about any significant unsettled legal questions concerning authority for or the conduct of a proposed undercover operation.

D. Approval by the Commissioner

The Commissioner or Associate Commissioner for Enforcement shall have the authority to approve operations recommended for approval by the Undercover Operations Review Committee. However, only the Commissioner may authorize a proposed operation if a reasonable expectation exists that:

(1) There may be a significant risk of violence or physical injury to individuals;

(2) A circumstance specified in paragraph IV(A)(14) or IV(A)(15) is reasonably expected to occur, in which case the undercover operation may be implemented only after the Deputy Attorney General or Attorney General has specifically approved that aspect of the operation in accordance with applicable law.

E. Duration of Authorization

(1) An undercover operation may not continue longer than is necessary to achieve the objective of the authorization. In any event, such an operation shall not continue longer than six (6) months without new authorization to proceed.

(2) Any undercover operation initially approved by a District Director, Chief Patrol Agent, or Regional Commissioner must be reauthorized at the next higher level if it lasts longer than six (6) months.

F. Authorization of Participation In "Otherwise Illegal" Activity

Notwithstanding any other provision of these guidelines, an undercover employee or cooperating private individual shall not engage, except in accordance with this paragraph, in otherwise illegal activity.

(1) No official shall recommend or approve an undercover employee's or cooperating private individual's planned or reasonably foreseeable participation in otherwise illegal activity unless the participation is justified in order:

(a) to obtain information or evidence necessary for paramount prosecutive purposes;

(b) to establish and maintain credibility or cover with persons associated with the criminal activity under investigation; or

(c) to prevent or avoid the danger of death or serious bodily injury.

(2) Participation in otherwise illegal activity which would be proscribed by federal, state, or local law as a felony or which would be otherwise a serious crime must be approved in advance by the Commissioner or the Associate Commissioner for Enforcement on the recommendation of the Undercover Operations Review Committee pursuant to paragraphs A-D, above. The Commissioner's approval is required, however, for participation in any otherwise illegal activity involving a significant risk of violence or physical injury to individuals. Approval by the Commissioner or the Associate Commissioner for Enforcement is not required for the making of false representations to third parties in concealment of personal identity or the true ownership of a proprietary; the purchase of fraudulent documents; the purchase, ownership, or possession of stolen property or contraband; or the transportation or concealment of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport or conceal illegal aliens. Approvals shall be recorded in writing.

A recommendation to the Central Office for approval of participation in such otherwise illegal activity must include the views of the United States Attorney or Strike Force Chief on why the participation is warranted.

(3) Participation in the purchase of fraudulent documents; the purchase, ownership, use, or possession of stolen property or contraband; or the transportation of illegal aliens when neither an undercover employee nor a cooperating private individual is a major participant in the scheme to transport illegal aliens must be approved in advance by the District Director or Chief Patrol Agent. Approvals by such officials shall be recorded in writing.

(4) The INS shall take reasonable steps to minimize the participation of an undercover employee or cooperating private individual in any otherwise illegal activity.

(5) An undercover employee or cooperating private individual shall not participate in any act of violence, initiate

or instigate any plan to commit criminal acts, or use unlawful investigative techniques to obtain information or evidence (e.g., illegal wiretapping, illegal mail opening, breaking and entering, or trespass amounting to an illegal search).

(6) If it becomes necessary to participate in otherwise illegal activity that was not foreseen or anticipated, an undercover employee or cooperating private individual should make every effort to consult with the District Director or Chief Patrol Agent. For otherwise illegal activity which would be a felony or which would be otherwise a serious crime, the District Director or Chief Patrol Agent can provide emergency authorization under paragraph IV(D), above. If consultation with the District Director or Chief Patrol Agent is impossible and there is not an immediate and grave threat to life or physical safety (destruction of property through arson or bombing is to be considered a grave threat to life or physical safety), an undercover employee or cooperating private individual may participate in the otherwise illegal activity so long as he or she does not take part in and makes every effort to prevent any act of violence. A report to the District Director or Chief Patrol Agent shall be made as soon as possible after the participation, and the District Director or Chief Patrol Agent shall submit a full report to the Central Office. The Central Office shall promptly inform the members of the Undercover Operations Review Committee.

(7) Nothing in these guidelines prohibits establishing, funding, and maintaining secure cover for an undercover operation by making false representations to third parties in concealment of personal identity or the true ownership of a proprietary (e.g., false statements in obtaining driver's licenses, vehicle registrations, occupancy permits, and business licenses) when such action is approved in advance by the appropriate District Director or Chief Patrol Agent.

(8) Nothing in paragraph F(5) or (6), above, prohibits an undercover employee or cooperating private individual from taking reasonable measures of self-defense in an emergency to protect his or her own life or the life of others against wrongful force. Such measure shall be reported to the District Director, Chief Patrol Agent, United States Attorney, or Strike Force Chief as soon as possible.

(9) If a serious incident of violence should occur in the course of the criminal activity under investigation and an undercover employee or cooperating private individual participates in any fashion in such serious incident of violence, the District Director or Chief Patrol Agent shall immediately inform the Central Office. The Central Office shall promptly inform the Assistant Attorney General in charge of the Criminal Division.

G. Authorization for the Creation of Opportunities for Criminal Activity

(1) Entrapment should be scrupulously avoided. Entrapment is the inducement or encouragement of an individual to engage in criminal activity in which he or she would otherwise not be disposed to engage.

(2) In addition to complying with any legal requirements, before approving an undercover operation involving an invitation to engage in criminal activity, the approving authority should be satisfied that:

(a) The corrupt nature of the activity is reasonably clear to potential subjects;

(b) There is a reasonable indication that the undercover operation will reveal criminal activities; and

(c) The nature of any inducement is not unjustifiable in view of the character of the criminal activity in which the individual is invited to engage.

(3) Under the law of entrapment, inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged, or is engaging, in the criminal activity that is properly under investigation. Nonetheless, no such undercover operation shall be approved without the specific written authorization of the Commissioner unless the Undercover Operations Review Committee determines (see paragraph C, above), insofar as practicable, that either:

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in criminal activity of a similar type; or

(b) the opportunity for criminal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated criminal activity.

(4) In any undercover operation, the decision to offer an inducement to an individual, or to otherwise invite an individual to engage in criminal activity, shall be based solely on law enforcement considerations.

H. Authorization of Investigative Interviews that Are Not Part of an Undercover Operation

Notwithstanding any other provision of these guidelines, routine investigative interviews that are not part of an undercover operation may be conducted without the authorization of the Central Office and without compliance with paragraphs IV (B) and (C) and V(A) and (B). These include so-called "pretext" interviews in which an INS employee uses an alias or cover identity to conceal his or her relationship with the INS.

However, this authority does not apply to an investigative interview that involves a sensitive circumstance listed in paragraph IV(A). Any investigative interview involving a sensitive circumstance -- even an interview that is not conducted as part of an undercover operation -- may only be approved pursuant to the procedures set forth in paragraphs V(A),(B),(C) and (D) (Applications referred to Central Office) or pursuant to the emergency authority prescribed in paragraph IV(D) if applicable.

VI. MONITORING AND CONTROL OF UNDERCOVER OPERATIONS

A. Continuing Consultation with United States Attorney or Strike Force Chief

Throughout the course of any undercover operation, the District Director or Chief Patrol Agent or his or her designee shall consult periodically with the United States Attorney or Strike Force Chief or his or her designee concerning the plans, tactics, and anticipated problems of the operation.

B. Serious Legal, Ethical, Prosecutive, or Departmental Policy Questions, and Previously Unforeseen Sensitive Circumstances

(1) In any undercover operation, the District Director or Chief Patrol Agent shall, after consultation with the United States Attorney or Strike Force Chief, consult with the Central Office whenever a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation. The Central Office shall promptly inform the Department of Justice members of the Undercover Operations Review Committee of any such question and its proposed resolution.

(2) This procedure shall be followed if an undercover operation is likely to involve one of the circumstances listed in paragraph IV(A) and either (a) the District Director's or Chief Patrol Agent's application for undercover operation approval did not contemplate the occurrence of that circumstance or (b) the undercover operation was approved by the District Director or Chief Patrol Agent under his own authority. In such cases the District Director or Chief Patrol Agent shall also submit a written application for continued authorization of the operation or an amendment of the existing application pursuant to paragraph IV(A), above.

(3) Whenever such a new authorization or amended authorization is required, the INS shall consult with the United States Attorney or Strike Force Chief and with the Department of Justice members of the Undercover Operations Review Committee on whether to modify, suspend, or terminate the undercover operation pending full processing of the application or amendment.

(4) After the institution of formal legal charges against a subject, concurrence by the United States Attorney or Strike Force Chief must be received before an undercover employee or a cooperating private individual can be allowed to attend a meeting between the subject and his or her lawyer.

C. Annual Report Of Undercover Operations Review Committee

(1) The Undercover Operations Review Committee shall retain a file of all applications for approval of undercover operations submitted to it, together with a written record of the Committee's action on the applications and any ultimate disposition by the Commissioner or Associate Commissioner for Enforcement. The INS shall also prepare a short summary of each undercover operation approved by the Committee. These records and summaries shall be available for inspection by a designee of the Deputy Attorney General or of the Assistant Attorney General in charge of the Criminal Division.

(2) On an annual basis, the Committee shall submit to the Commissioner, Attorney General, Deputy Attorney General, and Assistant Attorney General in charge of the Criminal Division, a written report summarizing: (a) the types of undercover operations approved and (b) the major issues addressed by the Committee in reviewing applications and how they were resolved.

D. Preparation of Undercover Employees

(1) The District Director, Chief Patrol Agent, or a designated supervisory officer shall review with each undercover employee prior to the employee's participation in an investigation, the conduct that the undercover employee is expected to undertake and other conduct which is expected during the investigation. The District Director, Chief Patrol Agent, or designated supervisory officer shall expressly discuss with each undercover

employee any of the circumstances specified in paragraph IV(A) which are reasonably expected to occur. Each undercover employee shall be instructed generally and in relation to the proposed undercover operation that he or she shall not participate in any act of violence, initiate or instigate any plan to commit criminal acts, use unlawful investigative techniques to obtain information or evidence, or engage in any conduct that would violate restrictions on investigative techniques or INS conduct contained in Department policy, and that, except in an emergency situation, he or she shall not participate in any otherwise illegal activity for which authorization has not been obtained under these guidelines. When the INS learns that persons under investigation intend to commit a violent crime, any undercover employee used in connection with the investigation shall be instructed to try to discourage the violence.

(2) To the extent feasible, a similar review shall be conducted by a case officer with each cooperating private individual.

E. Review Of Undercover Employee Conduct

(1) From time to time during the course of the investigation, as is practicable, the District Director, Chief Patrol Agent, or designated supervisory officer shall review the actual conduct of the undercover employee, as well as the employee's proposed or reasonably foreseeable conduct for the remainder of the investigation, and shall make a determination whether the conduct of the employee has been permissible. This determination shall be communicated to the undercover employee as soon as practicable. Any findings of impermissible conduct shall be promptly reported to the Commissioner, and consultation with the Commissioner shall be undertaken before the employee continues his or her participation in the investigation. To the extent feasible, a similar review shall be made of the conduct of each cooperating private individual.

(2) A summary memorandum report shall be submitted at the conclusion of an undercover operation and shall include information concerning use of false representations to third parties in concealment of personal identity or the true ownership of a proprietary for establishing, funding, and maintaining secure cover for an undercover operation. The report shall also contain information concerning any otherwise illegal activity engaged in by an undercover employee or cooperating private individual. It shall be submitted to the District Director, Chief Patrol Agent, or designated supervisory officer, and copies shall be submitted to the Regional and Central Offices.

(3) Additionally, a written report on participation in any otherwise illegal activity which would be proscribed by federal, state, or local law and which is not routine to the investigation shall be made by an undercover employee to the District Director, Chief Patrol Agent, or designated supervisory officer, with copies to the Regional and Central Offices, as soon as possible after the participation in the otherwise illegal activity. To the extent feasible, a similar report should be made on the conduct of each cooperating private individual.

F. Deposit Of Proceeds; Liquidation Of Proprietaries

Whenever a proprietary with a net value over $50,000 is to be liquidated, sold, or otherwise disposed of, the INS, as much in advance as the Commissioner or his or her designee shall determine is practicable, shall report the circumstances to the Attorney General and the Comptroller General. The proceeds of the liquidation, sale, or other disposition shall be deposited in the Treasury of the United States as receipts.

VII. RESERVATION

These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, and they do not place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

WILLIAM FRENCH SMITH
Attorney General

Date: March 5, 1984

Effective March 19, 1984 WFS

Attachment 1

UNITED STATES GOVERNMENT
memorandum

DATE: MAY 9 1984

REPLY TO ATTN OF: Francis M. Mullen, Jr.
Administrator

SUBJECT: Headquarters Review of Sensitive Investigative Activities

TO: All SACs
All Country Attaches

Current DEA policies require that field management obtain prior Headquarters approval for certain types of investigative activities. I am expanding the list of activities requiring such approval to include any situation having a financial, legal, political, or public relations aspect to it that would make it of a "sensitive" nature. This centralization of approval authority should in no way be viewed as discouraging the pursuit of such activities. The intent here is only to assure that the activity is well planned, and is being conducted with the full knowledge and specific approval of Headquarters management.

Part I. Activities Currently Requiring Headquarters Approval

By way of reference, the following investigative activities already require Headquarters approval and are not affected by this memorandum:

1. Any single PE expenditure in excess of 20% of a Field Division/Country Office quarterly allowance (see 6134.22 A).

2. PI expenditures in excess of $10,000 per informant per quarter (see 6134.22 B).
3. Utilization of a Federal prisoner as an informant (see 6612.1 A).
4. Seeking the dismissal of a criminal charge against a defendant/informant (see 6612.1 G4).
5. Deviation from domestic policies as to informant development and handling by foreign offices (see 6612.1 H).
6. Foreign office establishment of informants (see 6612.1 I).
7. Recommending the dismissal of a case in lieu of disclosing an informant's identity (see 6612.36 C).
8. Payments to foreign informants in sensitive diplomatic situations (see 6612.42 D).
9. PI expenditures for informant protection (see 6612.43 B).
10. PI expenditures in excess of $500 to another agency's informant in a non-DEA controlled case (see 6612.43 C).
11. "Blacklisting" an informant (see 6612.52 B and C).
12. Entering an informant in the Witness Protection Program (see 6612.7).
13. Use of nonagent DEA personnel in an undercover operation (see 6621 D).
14. Use of a flashroll in excess of $100,000 (see 6623 A).
15. Use of trafficker-furnished funds in excess of $50,000 or substitution of DEA funds in excess of $5,000 (see 6625.21).
16. Any reverse undercover/proprietary/money laundering operation (see 6626.1).
17. Nonseizure of drugs (see 6626.8).
18. Decoders, Consensual Non-Telephone, and Non-Consensual Intercepts (see 6631).
19. Special Enforcement Operations (see 6682).

Not included in the above list are activities which require after-the-fact notification of Headquarters (i.e., shootings, assaults, etc.), or activities of an administrative nature (e.g., approval for certain types of travel, the establishment of a State and Local Task Force, etc.).

Part II. Additional Activities Henceforth Requiring Headquarters Approval

Henceforth, the following additional activities may only be conducted with prior Headquarters concurrence. Requests for concurrence will be via a written plan (memorandum or teletype) to the appropriate Drug Section Chief. The Drug Section Chief will coordinate the proposal with appropriate Headquarters elements. If exigent circumstances preclude the submission of a prior written plan, approval may be sought via telephone, with a written plan submitted as soon thereafter as possible.

The plan will cover the following points in sufficient detail for Headquarters to make an informed judgement:

a) Identify the activity for which approval is being sought (e.g., "Entering an Undercover Lease for an Apartment"), along with the file number and G-DEP identifier of the investigation(s).

b) Explain the circumstances which led up to the proposal (i.e., the basis for doing it and the objective being sought).

c) Explain the planned activity in full detail.

d) Summarize the significance of the investigation.

e) Report the views of the appropriate prosecutor on the planned activity. Generally, this will be the U.S. Attorney's Office. If the case is to be prosecuted non-Federally, this will be the appropriate state prosecutor. If a planned activity in a non-Federal case involves a potential violation of Federal law, then the views of both will be obtained and so reported.

1. Any investigation, or series of parallel investigations directed against the same targetted group, in which it is anticipated that projected expenditures will exceed $500,000 through any combination of PE, PI, or operating costs (do not include flashrolls in this calculation).

The Drug Section Chief will coordinate this proposal with AA and CC. Approval levels are as follows:

$500,000 to $1,000,000: AO
$1,000,000 to $1,500,000: AD
$1,500,000 or more: A

2. Any procurement of property exceeding $2500, or any lease exceeding $2500 or 30 days duration, in connection with an undercover or surveillance operation.

Note that 6133.23 presently requires that such matters be coordinated with Headquarters. This is now modified such that specific approval must be obtained via written plan.

The Drug Section Chief will coordinate the proposal with CC and AA, and upon mutual concurrence, AO will be the approving official.

3. Any proposed use of a bank or other financial institution to manipulate, issue, deposit or transfer funds, either DEA or trafficker-furnished (other than the use of a safety deposit box).

Field management should consult with AMC via telecon on the methods to be utilized in handling and accounting for the funds prior to submitting the written plan. The Drug Section Chief will coordinate the proposal with CC and AA, and upon mutual concurrence, AO will be the approving official.

4. Any proposed entry into an indemnity agreement or purchase of an insurance policy.

   The Drug Section Chief will coordinate the proposal with CC and AA, and upon mutual concurrence, AO will be the approving official.

5. Any proposed undercover operation that will involve the use of generated proceeds to offset expenses connected with the operation. Also see 6625.

   Field management should consult with AMC via telecon on the methods to be utilized in handling and accounting for the funds prior to submitting the written plan. The Drug Section Chief will coordinate the proposal with CC and AA, and upon mutual concurrence, AO will be the approving official.

6. Any proposed activity in which an undercover agent or informant will be put in a situation in which he/she may likely obtain privileged information. This includes, but is not limited to situations where the undercover agent or informant poses as an attorney, clergyman, physician, or media representative. Also see 6612.35 and 6632.41 A.

   The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, AO will be the approving official.

7. Any proposed domestic situation in which the undercover agent or informant may be required to participate in a violent crime, or an activity that is proscribed by Federal law as a felony, or is a felony or other serious violation of state law such as burglary or theft (excluding activities conducted in the course of official duties such as the possession of controlled substances or other contraband, or the making of false representations to third parties in the concealment of personal identity or the ownership of a proprietary). Foreign operations are governed by Chapter 65.

   The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, will forward the proposal through the chain of command to the Administrator for final approval.

8. Any proposed situation in which the undercover agent or informant is expected to be arrested and will seek to perpetuate the undercover operation should an arrest occur.

   The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, will forward the proposal through the chain of command to the Administrator for final approval.

9. Any proposed situation in which the undercover agent or informant will be required to give sworn testimony or affidavits in any proceeding in an undercover capacity.

   The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, will forward the proposal through the chain of command to the Administrator for final approval.

10. Any proposed activity which poses the threat of serious financial or physical harm to an innocent third party, or which could result in significant civil claims against the United States (whether in tort, contract, or claim for just compensation for the "taking" of property).

    The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, will forward the proposal through the chain of command to the Administrator for final approval.

11. Any undercover investigation of a corrupt public official (i.e., one who serves in an elected or appointed authoritative position of public trust in a Federal, state, local or foreign government), or any other person the investigation of whom could be expected to cause significant media attention.

    The Drug Section Chief will coordinate the proposal with CC, and upon mutual concurrence, will forward the proposal through the chain of command to the Administrator for final approval.

CC: AA, CC, AP, AO, DO, OMG, AMC

Attachment 2

Sensitive Investigative Activity Checklist
(For Headquarters Use Only)

Subject____________

Case_______________

G-DEP Classification____________________

Submitting SAC________________

Field Division________________

Date Received at Drug Section_________

I. Type of Proposal
(check more than one if applicable)

___Reverse U/C
___Proprietary
___High Projected Cost
___Lease/Procurement of Property
___Use of Bank/Financial Institution
___Indemnity Agreement/Insurance Policy
___Use of Generated Proceeds

___Potential Acquisition of Privileged Information
___Potential Participation in a Crime
___Arrest in U/C Capacity
___Sworn Testimony in U/C Capacity
___Potential Harm to Third Party
___Sensitive Target

II. If a Reverse U/C

___No Actual Drug Required
___Flash
___Temporary Release
___III E Furnishing
___Sham
___Essential Chemical

____
Type and Quanity of Drug/Substance

Subject:________
Case No.:________

Source of Drug/Substance/Chemical:

_____DEA Laboratory

Fully Coordinated with Laboratory Chief
__Yes __No __Not Specified

_____Office Evidence Custodian

_____From Submitting Office's Stockpile

_____To be Drawn from Stockpile of Other

Offices:____________________
Specify

_____Commercial

____
Specify

If a Pharmaceutical Preparation, Fully Coordinated with OD: ___Yes ___No

_____Trafficker Furnished

_____Other (specify)

III. If Other than a Reverse U/C, Give Full Details:

IV. Targets

(a) (Indicate which targets are preselected Class I or II. If none, explain significance in traffic and basis for exception to the preselection policy):

Subject:___________
Case No.:___________

(b) Documentation of significance in traffic

__Previous buy/sample

__Undercover Agent conversation

__Verified Informant conversation

__Title III

__Other Agency Information

____
(specify)

(c) Previous file references:

Numbers	G-DEP Code
________	________
________	________
________	________
________	________
________	________

V. Other Objectives

Targetted Assets:

Targetted Drug/Lab Seizures:

Subject:__________
Case No.:__________

VI. Basis for Using this approach in lieu of more traditional methods:

VII. Coordination

(a) Concurrence of U.S. Attorneys
__Yes __No

(b) Joint or Unilateral Investigation

(c) If joint, specify other agency:

(d) What agencies have been coordinated with?

VIII. Security - (synopsize measures for each):

(a) Site

(b) U/C Agent/Informant

(c) Money

(d) Drugs

Overall Evaluation of Security Measures:

Subject:__________
Case No.__________

IX. Overall assessment of proposal by Section Chief: (include any special conditions, concerns, interim discussions with SAC, etc.):

_______Concur

_______Non Concur

____
(Signature)

____
(Date)

X. Overall assessment by Office of Chief Counsel:

____Concur

____Non Concur

____
(Signature)

____
(Date)

XI. Co-Recommendation (as required)

AA Concur________________

Non-Concur________________

____
(Signature)

____
(Date)

AT Concur________________

Non Concur________________

____
(Signature)

____
(Date)

Special condition by either:

Subject:______________
Case No:______________

XII. Approvals/Endorsements:

(a) Deputy Assistant Administrator for Operations

______________________ ___Concur

______________________ ___Non-Concur
(Date)

(b) Assistant Administrator for Operations

______________________ ___Concur

______________________ ___Non-Concur
(Date)

(c) Deputy Administrator

______________ ___Concur

______________ ___Non-Concur
(Date)

(d) Administrator

______________ ___Concur

______________ ___Non-Concur
(Date)

Attachment 3

Coordination/Approval Requirements for Sensitive Investigative Activities

Activity	Coordination Required With	Approval Required From
a. Reverse Undercover (Non III E and not requiring a Field Laboratory to supply drugs, chemicals or sham)	CC	DO
b. Reverse Undercover Operation (Non III E but requiring a Field Laboratory to supply drugs, chemicals or sham)	CC, AT	DO
c. Reverse Undercover Operation (III E)	CC, AT	A

d. Proprietary Operation	CC, AA (and AT if drugs, chemicals, or sham to be supplied by a field laboratory)	
e. Projected expenditures in an investigation will exceed $500,000	CC, AA	AO
f. Projected expenditures in an investigation will exceed $1,000,000	CC, AA	AD
g. Projected expenditures in an investigation will exceed $1,500,000	CC, AA	A
h. Procurement of property exceeding $2500 or lease exceeding $2500 or 30 days	CC, AA	AO
i. Use of bank or financial institution	CC, AA	AO
j. Indemity agreement/insurance policy	CC, AA	AO
k. Use of generated proceeds	CC, AA	AO
l. Potential acquisition of privileged information	CC	AO
m. Potential participation in a crime	CC	A
n. Agent or informant may be arrested in u/c capacity	CC	A
o. Agent or informant will give sworn testimony in u/c capacity.	CC	A
p. Potential harm to third party	CC	A
q. Target is corrupt officials or otherwise sensitive	CC	A

NOTE: Where a proposed operation involves more than one of the above activities (e.g., a proprietary requiring the entry of a lease), the coordination required will be cumulative, and the approval level required will be the highest official called for among those activities.

THRESHOLD STANDARD FOR SENSITIVE OPERATIONS: DEFINITIONS

Question No. 6. Both of you have referred in your testimony to the problem of defining a "political or religious organization" for purposes of applying the higher threshold standard mandated by the bill for investigations targeting such groups. I agree that this will be a difficult problem, but not an unprecedented one.

The current FBI guidelines use similar terms in the provisions defining "sensitive circumstances," under which approval at the level of the undercover operation review committee is required. I assume there is some working definition that is applied in deciding whether or not a case targeting an allegedly political or religious group involves sensitive circumstances.

Why would it be any harder to come up with a definition of these terms in the context of what threshold standard is applicable, than it is in the context of what level of the Bureau has authority to approve an operation?

We would welcome your suggestions on how to define these and other terms in the bill, but the problem hardly seems insurmountable. Do you agree?

Response to question No. 6. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigations, Section II, paragraph C(1), provide that a general crimes investigation may be initiated by the FBI when facts or circumstances reasonably indicate that a Federal crime has been, is being, or will be committed.

The standard of "reasonable indication" is, of course, lower than probable cause. In determining whether there is reasonable indication of a Federal criminal violation, a Special Agent my take into account any objective facts or circumstances that a prudent investigator would consider. However, the standard does require specific facts or circumstances indicating a past, current, or impending violation. There must be an objective, factual basis for initiating the investigation; a mere "hunch" is insufficient. Section II, Paragraph C(3), further provides that the FBI supervisor authorizing an investigation must ensure that the facts or circumstances meeting the standard of reasonable indication have been recorded in writing. Thus existing guidelines create an objective threshold standard for initiating an undercover operation, make an identifiable official accountable for initiation of the operation, and require documentation of the decision to create a "paper trail" of the initiation of the operation.

Clearly, there is a threshold which must be met before initiating any investigation, undercover or otherwise. In addition, if there is a reasonable expectation that the undercover operation will involve sensitive circumstances, review by the Criminal Undercover Operations Review Committee and approval by the Assistant Director, Criminal Investigative Division, or the Director is required. The threshold standard of reasonable indication together with review by the Criminal Undercover Operations Review Committee and approval by the Assistant Director or Director ensures that there are adequate grounds for commencing the investigation, and that the undercover operation will be conducted in a lawful manner. In our opinion, this is the preferred approach.

The approach of S. 804 is to establish such a high threshold, probable cause, for undertaking undercover operations in which there is some risk of interference with the First Amendment rights or privileged relationships that the opportunity for such an investigation is virtually eliminated.

The probable cause standard is the threshold for obtaining an indictment, a search warrant, or for making an arrest, events which most often occur at the end of an investigation. If probable cause existed, there would generally be little need for an undercover operation as an indictment could be obtained and arrests made. The effect of the probable cause standard in S. 804, therefore, is to stand the criminal justice system on its head and prohibit undercover investigations of individuals or other entities that claim to be "political" or "religious." Some groups claiming to be "political" or "religious" have proven to be involved in criminal activity.

The Attorney General's Guidelines permit the investigation of persons or entities that are, or claim to be, religious or political if there is a reasonable indication that Federal laws are being violated. In addition, the Criminal Undercover Operations Review Committee and the Assistant Director, Criminal Investigative Division, or the Director must be satisfied that the undercover operation is necessary to investigate a serious criminal problem, that the risks of harm to individuals and institutions are minimized and that all constitutional and other legal requirements are met.

The approach of the Attorney General's Guidelines serves to avoid much litigation. As stated in the response to question four, we do not believe that Sec. 3803(e) will serve to keep S. 804 from causing endless litigation. We believe that we will have to litigate countless pre-trial motions questioning whether probable cause existed to commence the investigation and/or whether the investigation involved a "political" or "religious" organization. The Attorney General's Guidelines are the preferred approach because the issues which the FBI and the Department of Justice must address are whether there are grounds to undertake the investigation and whether the Criminal Undercover Operations Review Committee and Assistant Director, Criminal Investigative Division, or the Director determines that the investigation can be conducted in a manner which protects individual rights. The Supreme Court and most other courts have avoided creation of a threshold standard for undertaking and conducting an undercover operation.

In short, broad phrases that are inherently vague can be appropriate and useful in establishing internal review procedures; such guidelines are designed to provide general flexible guidance in a variety of situations. No attempt is made under the FBI Undercover Guidelines to define phrases such as "political or religious organizations" because no greater precision is necessary; any undercover investigation that even arguably involves such a group warrants the review of the Undercover Operations Review Committee.

In contrast, the use of such phrases in a statute such as S. 804 poses substantial and unwarranted obstacles to law enforcement. The proposed statute stands as a barrier to the use of a legitimate law enforcement technique, would in effect immunize certain privileged groups from investigation for violations of criminal law, and would place law enforcement officials in the untenable position of utilizing an illegal investigative technique were they to "guess wrong" about the meaning and scope of an inherently vague phrase. The stark difference in impact of the use of similar phrases in internal guidelines as opposed to a statutory scheme demonstrates, we believe, the decided advantage of such guidelines over any attempt to cover the universe of possible investigative situation in a statute.

EFFECT OF SEC. 3801(a)

Question No. 7. Your testimony reflects the view that proposed section 3801(a) is unnecessary, because the Attorney General's statutory authority to investigate federal offenses extends to the use of undercover operations and the issuance of undercover guidelines. However, section 3801(a) would also establish the principle that undercover operations may not be used by law enforcement except pursuant to guidelines. What is the policy of the Justice Department on this question? Are undercover operations permissible even if there are no guidelines in effect? Now that the DEA and INS have issued guidelines, does any component of the Justice Department conduct undercover operations without the benefit of guidelines? If so, why have no guidelines been issued to govern the undercover activities of such component(s)?

Response to question No. 7. Undercover operations are a necessary and lawful tool in the investigation of federal crimes. It is not the existence of guidelines that provides the authority of investigative agencies to utilize undercover operations; rather it is the authority to investigate criminal activities, granted by statute or order of the Attorney General. Therefore, undercover operations clearly may be permissible even if there are no guidelines in effect, as were, for example, FBI undercover operations prior to adoption of the FBI Undercover Guidelines. However, our experience has been that the Guidelines are an excellent vehicle for regularized consideration and review of undercover operations, and with the recent adoption of the INS Guidelines, each component of the Department of Justice that conducts such investigations on a regular basis does so pursuant to Guidelines.

It should be noted that the U.S. Marshals Service (USMS) has upon occasion engaged in undercover activities in connection with its responsibility to apprehend fugitives from justice. In the FIST VI operation in Los Angeles, for example, Deputy United States Marshals posed as delivery personnel in order to apprehend fugitives. Such USMS operations are infrequent and are directed at individuals as to whom judicial warrants are outstanding with the result that guidelines are not felt to be necessary at this time.

"FORMAL INTERPRETATIONS" UNDER SEC. 3801(c)

Question No. 8. The requirement contained in proposed section 3801(c) for 30-day notice of formal interpretations of the guidelines is intended to refer to "matters of general application," as Judge Webster assumed in his testimony, rather than to the operational application of the guidelines to particular fact situations, as Mr. Jensen assumed. As you may know, one of the motivations for inclusion of this legislative recommendation was the Justice Department's unusually narrow interpretation of "public official" under the FBI undercover guidelines. The Senate Select Committee found "that several other words and phrases in the guidelines had been given 'intepretations' plainly inconsistent with their ordinary meanings, and that none of those 'interpretations' had been submitted" to Congress.

Assuming that the intent of this provision is clarified, and that, if necessary, an exception is established for cases in which compliance with the advance notice requirement would delay ongoing investigations, what is the response of the Justice Department to this proposal?

Response to question No. 8. Sec. 3801(c) would require that the Attorney General submit to Congress every amendment and "formal interpretation" of the Guidelines thirty days prior to their promulgation. The Department of Justice has no objection to transmitting to Congress any new or amended Guidelines or responding to Congressional requests regarding the manner in which the Guidelines are being interpreted. There is now no established formal procedure through which binding interpretations of the Guidelines are promulgated; rather they are interpreted through experience and application to specific fact patterns. The FBI's working definition of "public official" referred to in the Committee Report is an informal definition, adopted by the FBI in its application of the Guidelines, that may be changed at any time if experience should show that a broader interpretation is appropriate; it has not been adopted at the Departmental level. Should experience show a need for greater clarity or a change in procedure, an amendment of the Guidelines would be sought. However, should a "formal interpretation" procedure be established, and the reporting requirement now contained in the statute be limited to "matters of general application" adopted at a Departmental level, rather than interpretations of particular fact situations, the Department would have no objection to providing notice of such interpretations to Congress. The provision should, of course, include an exception in cases wherein the notice requirement would harm ongoing investigations.

"PRETEXT INTERVIEWS"

Question No. 9. Judge Webster's testimony expresses concern about the effect of the threshold standards on "routine 'pretext interviews.'" Under what circumstances would it be necessary for an FBI agent to conceal his relationship with the Bureau, if there is not a reasonable indication of criminal activity, or of some other activity properly subject to investigation under applicable guidelines? Could you give some examples?

Does the FBI have working definition of a "pretext interview"? If so, is the definition incorporated into guidelines?

If pretext interviews ought to be excluded from the scope of threshold requirements, can you suggest language that will provide such an exception, while retaining the reasonable indication standard for full-fledged investigations, as the undercover guidelines now provide?

Response to question No. 9. As a part of the FBI's investigative responsibilities, it is necessary to gather information about witnesses, victims, and others not engaged in criminal activity. The names, addresses, and other information about such persons are essential to the investigative process.

It may also be necessary for a Special Agent to assume an identity other than his own on limited occasions in order to obtain information about the location or identity of persons held hostage; to locate a fugitive; to conduct a surveillance, or to assess the reliability of a person who has provided a questionable "lead" in an investigation.

The use of a pretext interview in circumstances such as these is a very limited use of the undercover technique. Sec. 3803(a)(1) would have the effect of transforming any pretext interview into an undercover operation. We believe this to be unnecessary and unwarranted.

In our opinion, the Attorney General's Guidelines on General Crimes, Racketeering Enterprise, and Domestic Security/Terrorism Investigation and Undercover Operations together with FBI and Department of Justice rules and regulations adequately control the use of this technique. For example, the Attorney General's Guidelines on General Crimes, Section II B(6)(f), provides that pretext interviews may be used during preliminary inquiries, except that pretext interviews of a potential subject's employer or co-workers cannot be conducted unless the interviewee was the complaintant. Additionally, the Attorney General's Guidelines on FBI Undercover Operations, Section K, provide that any interview, even an interview that is not conducted as part of an undercover operation, that involves sensitive circumstances may be approved only after review by the Criminal Undercover Operations Review Committee. Clearly, therefore, the technique is limited and controlled.

Finally, although "pretext interview" is not defined in the Guidelines, and undercover operation is defined. By memorandum to the Attorney General, dated July 20, 1981, an undercover operation was defined as "a method of conducting a series of related investigative activities over a period of time utilizing an 'undercover employee' as defined in the Attorney General's Guidelines on FBI Undercover Operations." This definition makes it clear that when an Agent assumes an identity other than his own and engages in a series of related investigative activities, including pretext interviews, over a period of time, the Agent's investigative activities will be considered an undercover operation and be governed by the Attorney General's Guidelines on FBI Undercover Operations.

OPPORTUNITY TO COMMIT A CRIME

Question No. 10. Mr. Neal stressed, in his testimony, that the FBI undercover guidelines do not require a predicate of "reasonable suspicion" before an undercover operative offers an outside party an opportunity to commit a crime. Since this touches upon one of the most controversial features of undercover operations, it may be worthwhile to explore the provisions of the guidelines in this regard.

Paragraph J(3) of the undercover guidelines authorizes the offering of inducements to commit a crime under three circumstances. The existence of a reasonable indication of criminal activity is one of the three. The second is the structuring of the opportunity for illegal activity in such a way as to attract only those predisposed to commit the crime. The third circumstance, in which neither reasonable indication nor a properly structured opportunity need exist, requires the specific written authorization of the Director.

In those circumstances in which the Undercover Operations Review Committee has approved the offering of inducements to commit a crime, how many cases have involved the existence of a reasonable indication? How many have involved a properly structured opportunity?

What is the justification for permitting this activity upon the Director's written authorization, without meting either of the other tests? How many times has this authorization been given?

Response to question No. 10. Generally, in those circumstances in which the Criminal Undercover Operations Review Committee has recommended and the Director or designated Assistant Director has authorized the offering of inducements to commit a crime, there has been a reasonable indication of criminal activity, and the opportunity for illegal activity has been structured so that there is reason to believe that persons drawn to it are predisposed to engage in the contemplated illegal activity. We can recall no undercover operation, other than some of the early "sting" operations in which stolen property was purchased at law enforcement store fronts, in which the offer of inducements were based solely on a properly structured opportunity.

It is the policy of the Department of Justice that, except in the most extraordinary circumstances, no undercover operation will be approved that is not based upon a reasonable indication of criminal activity and not structured in a manner to clearly demonstrate the predisposition of those persons under investigation.

We are aware of no instance in which the Director has authorized an undercover operation that was not based upon a reasonable indication of criminal activity or a properly structured opportunity for illegal activity. The Attorney General's Guidelines on FBI Undercover Operations provide for such an authorization because there may be situations involving a threat to life, of great property damage, or other extraordinary law enforcement considerations, that do not fit neatly into Section J(3)(a) or (b).

LITIGATING THE THRESHOLD STANDARD

Question No. 11. I share your concern that a statutory threshold standard for initiation of an undercover investigation might become an invitation to litigation over collateral issues in the context of a criminal prosecution. S. 804 attempts to avoid this by the language of proposed section 3803(e). The existing FBI guidelines are responsive to the same fear; they include a reservations clause designed to eliminate the question of compliance with the guidelines from the matters that may be litigated.

Since the status quo already is, as Judge Webster puts it, that the government is on trial in every prosecution resulting from an undercover operation, would the enactment of statutory threshold standards, such as those contained in S. 804, necessarily worsen the situation?

Since both the proponents of S. 804 and the Justice Department share the belief that noncompliance with the standards ought not to constitute an independent defense, nor independent grounds for suppression of evidence, can you suggest language that will express that intent more clearly than proposed section 3803(e) succeeds in doing?

Response to question No. 11. As we indicated in our testimony, we oppose the enactment of legislation setting out procedures for initiating and conducting undercover operations as unnecessary and as almost certain to be unduly inflexible and restrictive. We believe that guidelines established by the Attorney General are a much sounder way of ensuring that undercover operations are carried out within the confines of the law. We discussed our specific objection to Sec. 3803(e) in our prepared testimony on S. 804 but, to reiterate, the subsection could authorize the bringing of motions to suppress evidence allegedly obtained in violation of the guidelines. In *United States* v. *Caceres*, 440 U.S. 741 (1979) the Supreme Court indicated that a violation of a statute or of a guideline required by a statute could well support a suppression motion in the absence of a contrary Congressional intent. Moreover, embodying the investigative guidelines in a statute can only encourage defense counsel to attempt by whatever means to call them to the attention of a jury and to argue that "fairness" requires the jury to nullify whatever the statute says about a violation not providing a defense and to return an acquittal in any case where the government's compliance can be alleged to be less than perfect. Since most jurors would assume that the "violation" of a statute was a more serious matter than the violation of a guideline, the enactment of S. 804 would only worsen the present situation in which the conduct of the government is now questioned in virtually every prosecution resulting from an undercover operation.

COMPOSITION OF CRIMINAL UNDERCOVER OPERATIONS REVIEW COMMITTEES

Question No. 12. Mr. Jensen's testimony indicates that the composition of the Criminal Undercover Operations Review Committee (CUORCs) should be left to the discretion of the Attorney General. Has the Attorney General given any consideration to the suggestion that the CUORCs' membership should be expanded to include representation from divisions of the Justice Department outside the Criminal Division? If so, why has this suggestion been rejected?

In view of the important role played by the CUORCs in regulating the conduct of undercover operations, do you see any value in expanding the committees to include officials whose primary responsibility is not the investigation of prosecution of federal crimes? Would not such an expansion be conducive to the consideration of factors other than whether or not a particular investigative technique aids an investigation or furthers a prosecution?

S. 804 provides for representation of the Office of Legal Counsel on the CUORCs. The House subcommittee report recommends inclusion of lawyers from the Civil and Civil Rights Divisions. If the membership of the committees were to be expanded beyond the Criminal Division of the Justice Department, which DOJ office would, in your view, have the strongest argument for inclusion?

Response to question No. 12. Consideration has been given to including individuals from Divisions other than the Criminal Division on the FBI Undercover Operations Review Committee. After careful consideration, it has been decided that such representation at this time is not warranted. The great majority of the issues raised before the Committee do not require the special expertise of lawyers whose primary experience has been in the areas of civil or civil rights law; most issues are straightforward criminal law enforcement matters. When an issue arises involving a particularly difficult question in another area of the law, the Committee members are free to work the advice of other attorneys in the Department. It was therefore concluded that regular participation in the review of all sensitive criminal undercover matters by attorneys unfamiliar with the criminal law was not necessary and would not be a particularly valuable use of their time or resources.

The implication of Question 12 that because of their experience in the area of criminal law the only issue that Criminal Division attorneys focus on is whether the undercover technique would advance an investigation is entirely unwarranted. Indeed, because of their primary responsibility for supervising prosecutions growing out of such investigation, Criminal Division attorneys are extremely sensitive to the problems and pitfalls of undercover operations, including those that might be thought of as civil liability or civil rights issues.

Representation of each of the Divisions and Offices mentioned in the Senate and House recommendations has been considered but concluded to be unnecessary. The Civil Rights Division primarily enforces laws proscribing discrimination in education, employment, housing, voting and other areas. Few of its senior attorneys would have particular expertise to offer the Undercover Review Committee that would be relevant to the issues it must routinely consider. The Office of legal Counsel is a very small group of attorneys who specialize in providing legal advice on a variety of unusually difficult or complex legal issues government-wide. The views of the Office of Legal Counsel are solicited by the Committee when necessary, a procedure that has worked very well thus far. Potential civil liability issues in undercover operations tend to be predictable and are issues with which Criminal Division attorneys experienced with such operations are familiar; the contribution of Civil Division attorneys to the Committee's deliberations would be slight. Again, should an unusual or difficult issue arise, the Committee members are free to seek advice from other Departmental attorneys.

It is our conclusion that the composition of the Undercover Review Committees should be left to the discretion of the Attorney General so that their membership can reflect the anticipated work of each Committee.

FBI PARTICIPATION ON OTHER UNDERCOVER OPERATIONS REVIEW COMMITTEES

Question No. 13. Mr. Jensen, in your testimony you state that there is "no justification" for any FBI official to serve on any other agency's Undercover Operations Review Committee. Wouldn't the common link of FBI participation be helpful in coordinating undercover operations of the various components, and in avoiding the conflicts between separate undercover operations that have occasionally cropped up in the past?

For example, a 1982 Judiciary Committee staff report found that both the FBI and the office of the U.S. Attorney for the Southern District of New York had separate informants involved in the same alleged conspiracy. At one point, the FBI commenced an undercover operation targeted against the U.S. Attorney's informant. For some time, neither agency was fully aware of the others' operation. Shouldn't one of the Justice Department law enforcement agencies at least have access to information concerning the other agencies' undercover operations in order to minimize the possibility of this sort of fiasco?

In the absence of FBI participation in all the Undercover Operation Review Committees, how are such operations coordinated among the different law enforcement components today?

There have been more and more joint FBI–DEA investigations in recent years. How are the Undercover Operations Review Committees constituted in the case of an undercover joint venture?

Response to question No. 13. Question 13 displays some misunderstanding of the role of the Undercover Operations Review Committees. These Committees neither direct undercover operations (and thus are not in a position to "coordinate" joint operations) nor do they review all such operations (only those that involve "sensitive circumstances") and thus cannot effectively serve as a "clearinghouse" to guard against conflicts among investigations. Merely having an FBI representative serve on all Undercover Operations Review Committees would offer little protection against these occasional problems. Far greater protection against conflicts is offered by the fact that the U.S. Attorney in whose district the investigation is to be undertaken must review and approve all sensitive undercover investigations in writing. The U.S. Attorney is normally kept apprised of all major investigations in the district without regard to whether they involve undercover operations.

In most joint investigations, the primary responsibility for supervising the undercover element of the investigation is assumed by the lead participating investigative agency and the authorization and review procedures of that agency are followed. FBI policy is to condition its participation in joint investigations upon adherence to the Attorney General's undercover guidelines. Thus any undercover operation in which the FBI participates is subject to the complete range of safeguards established by the guidelines.

NON-JUSTICE UNDERCOVER OPERATIONS

Question No. 14. Mr. Jensen, although the Justice Department prosecutes all crimes against the United States, it is not always directly involved in investigating them. Enforcement responsibilities are sometimes given to agencies outside the Justice Department, such as the Internal Revenue Service and the Bureau of Alcohol, Tobacco and Firearms within the Treasury Department. However, the cases that these agencies make come back to Justice for prosecution.

According to news reports, several of these non-Justice Department law enforcement agencies are expanding their use of undercover operations. Have they sought advice or assistance from the Justice Department in drafting guidelines to control the use of these operations? Has Justice encountered any particular problems in the prosecution of cases arising from non-Justice Department undercover operations that might have been avoided if your department had become involved at a step in the process earlier than prosecution?

Do you have any thoughts on the best way for Justice Department components, particularly the FBI, to share with other law enforcement agencies the lessons they have learned from their active involvement in undercover operations over the last few years?

Response to question No. 14. The Department has always urged early consultation with the appropriate prosecutor, whether in the Department of Justice or the U.S. Attorney's Office, whenever any investigative agency is considering an undercover investigation, a practice that has helped to avoid operational problems and that has facilitated the exchange of advice and assistance between investigative agencies. Furthermore, in most occasions when a substantial undercover operation is considered, the assistance of the FBI is sought out, another practice that has helped to avoid serious problems. However, our experience with regulating the conduct of undercover operations through the use of Guidelines has been on the whole positive, and we support and encourage the development of Guidelines by investigative agencies outside the Department of Justice.

Lectures and seminars on the handling of undercover operations by federal investigators are a regular part of training efforts sponsored by the Department of Justice. The FBI shares its knowledge and experience through participation in joint investigations. The Department of Justice also has a number of individuals experienced in such investigations, including the members of the Undercover Operations Review Committees, who are available for advice and consultation on problems that might arise in the planning or execution of such investigations. These efforts to share the lessons that have been learned from the handling of undercover operations have worked well thus far, but should organizations other than the FBI, DEA and INS begin to use substantial numbers of undercover investigations, a more formal, coordinated approach to training may become necessary.

"PRIVATE" STINGS BY ABSCAM VETERANS

Question No. 15. I have ordered included in the hearing record a story from the New York Times of May 4, 1984, headlined "Leather Goods Concern Used a Sting Operation." It reports that the Louis Vuitton leather goods company hired Mel Weinberg, Thomas Puccio, and Gunnar Askeland to run an undercover sting operation against persons suspected of trafficking in counterfeit leather goods. Of course, these three names are familiar ones: the chief cooperating witness, the chief prosecutor, and one of the FBI agents chiefly involved in Abscam.

The story is interesting for several reasons, not least of which is that the private sting, which involved surreptitious audio and video recording, was approved by a U.S. District Judge as part of a criminal contempt proceeding against the alleged counterfeiters.

Does the existence of this kind of "private" undercover operation suggest an even greater need for federal legislation on undercover operations? If undercover work is going to become a growth industry, shouldn't the federal government adopt the exemplary role of articulating the standards that would allow such operations to proceed fairly and with a proper respect for privacy and individual rights?

More specifically, with respect to this case, Mr. Askeland, who was an FBI agent during the time of Abscam, left the Bureau during the time that he helped to run the undercover operation for Louis Vuitton. According to the Times' report, he is now back with the FBI. It is not clear from the story whether Askeland was actually in a business relationship with Weinberg, or simply working along with Weinberg in the execution of this operation. But in either case, it would seem to me that his participation raises some serious questions about the suitability of his return to the Bureau as an agent. After all, Mel Weinberg is not exactly the ideal business associate for an FBI agent. As you know, the Select Committee concluded that he was probably guilty of fraud, perjury, fabrication of evidence, and some other crimes.

Judge Webster, could you look into the circumstances surrounding Mr. Askeland's participation with Mr. Weinberg in this private sting operation, and whether it was fully disclosed to the Bureau when Mr. Askeland rejoined the ranks? I would appreciate your views on whether or not there was any improper conduct or poor judgment in the decision to take Mr. Askeland back.

Response to question No. 15. The court-approved conduct of private citizens does not suggest to us a need for guidelines imposed by statute for FBI undercover operations. The question seems premised on the notion that a statute would provide a model which would be followed by those not affected by the measure. We are uncertain that would be the result.

Mr. Askeland was employed by Kanner Security Group, Inc., Miami, Florida, during March 1983 when the sting operation in question was underway. Mr. Mel Weinberg was under contracts as a consultant for the same company during the period from January 1982 until June 1983. Mr. Weinberg was utilized by that company and Mr. Askeland worked with him on the sting operation involving Louis Vuitton Leather Goods Company in New York, which reportedly was being victimized. The undercover operation was completed in May 1983 and was followed by widespread publicity both in New York City and Miami, Florida.

The context of the New York Times article of May 4, 1984, entitled "Leather Goods Concern Used a Sting Operation," by Leslie Maitland-Werner, appears accurate as to what materialized. It further appears, based on the aforementioned publicity, that it was commonly known that Mr. Askeland had worked with Mr. Weinberg in this sting operation. Based on this knowledge, it was never considered that there was any impropriety since a U.S. District Judge from the inception of the operation authorized the investigation and the procedures that were to be followed. Another U.S. District Judge heard the case and ruled against the defendants' motion that the company's lawyers had been granted overly broad jurisdiction when the first U.S. District Judge designated them as temporary Government prosecutors.

Mr. Askeland's reinstatement was based on his record up to the time of his resignation in September 1982 and the fact that no questionable or derogatory information was developed during a background investigation from that period until his reappointment in January 1984. There is no indication whatsoever of any improper conduct or poor judgment relevant to the decision to reinstate Mr. Askeland in the FBI.

With respect to private "sting" operations generally, the Department does not encourage or condone such operations, does not provide a cooperative environment for them nor encourage official participation in such activities. Moreover, we would vigorously discourage such private operations in situations where they might jeopardize official law enforcement operations.

OPERATION COLCOR

Question No. 16. The report of the House Subcommittee on Civil and Constitutional Rights was quite critical of the FBI's Operation COLCOR, and some of the witnesses before the Criminal Law Subcommittee echoed concerns about the impact of this operation on the electoral processes in North Carolina. Could you respond to these criticisms? In particular, what safeguards were employed to insure that the Bureau's activities in COLCOR did not impinge on First Amendment rights?

Response to question No. 16. Colcor was an undercover investigation of public corruption and other violations conducted in North Carolina. Considerable criticism has been leveled at Colcor. In particular, the Report of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives on FBI Undercover Operations charged that Colcor was an example of how the FBI has demonstrated "unconscionable arrogance and insensitivity regarding interference in the political and judicial process". We disagree. The facts demonstrate that Colcor was a success, both in terms of prosecutions and in safeguarding Constitutional rights and privileges.

Colcor was initiated during August 1980, based upon information furnished by a confidential source who reported to the FBI that he was forced to make cash payments to members of the Whiteville, North Carolina, Police Department and the fire inspector of that city to continue to operate a legitimate amusement business. As the investigation proceeded, the undercover Agents were introduced to the Chairman of the Columbus County Board of Commissioners.

Between March 1918, and August 1981, undercover Agents were involved in many conversations with the Chairman of the Columbus County Board of Commissioners concerning what the Chairman believed to be criminal activities of the undercover Agents. The undercover Agents also made bribe payments to the Chairman for his assistance in these activities, which included buying and selling stolen property.

Part of the undercover scenario included representations by the undercover Agents that they intended to open a beer-and-wine bar and restaurant in Chadbourn, North Carolina, on behalf of their organized crime backers. The Chairman of the Columbus County Board of Commissioners, during a consensually recorded conversation, suggested that the bar should have liquor-by-the-drink. The Chairman of the Columbus County Board of Commissioners initiated a conversation regarding the possibility of a liquor-by-the-drink referendum being passed by the voters in different sections of the county. In reply to a general question by the undercover Agents as to the best location for such a vote, the Chairman responded, "I can get Bolton fixed up for you in a . . . hurry. I can get Bolton done with a tip of your . . . hat." He went on to say, "I can control the vote down there."

During this conversation the Chairman told the undercover Agents that Bolton was a town where votes were controlled by cash payoffs and that these payments went to a particular local leader. The Chairman furnished factual information about past rigged elections including the Chairman's own election.

The Chairman and a politically influential associate of his approached the undercover Agents and said that for a price they were capable of and willing to exert enough influence on the Board of Aldermen in Bolton to have them authorize and hold a special election to permit the sale of liquor-by-the-drink and to ensure that the undercover Agents would obtain the only license to sell liquor-by-the-drink. The undercover Agents made payments to the Chairman and his friend, but no payments were made to the Aldermen. Eventually, a petition containing the signatures of 125 of Bolton's 338 registered voters was presented by a citizen to the Board of Aldermen, which voted 4 to 1 to submit a liquor-by-the-drink referendum to the voters.

After several unsuccessful attempts by the undercover Agents to arrange postponement of the referendum vote, the First Assistant United States Attorney in Raleigh, North Carolina, contacted each member of the Board of Aldermen, the mayor PRO TEM, and town attorney and requested that the referendum be delayed or canceled because of possible outside influence on the election and possible voter fraud. He also made a public statement, reported in the local newspaper, that a Federal grand jury was investigating the circumstances leading to the upcoming referendum. The Aldermen decided to go forward with the referendum and the measure passed by a vote of 137 to 76.

The Chairman of the Columbus County Board of Commissioners testified in Federal court that he initiated the liquor-by-the-drink matter, not the FBI undercover Agents. Further, the former Chairwoman of the New Hanover County Commission, who also served on the Cape Fear Council of Governments, a regional group, contacted the FBI and volunteered that the liquor-by-the-drink issue had been raised by her group prior to the COLCOR investigation. She states that when she read in the newspaper that the FBI allegedly had initiated the liquor-by-the-drink idea she felt compelled to make this information available.

The report also alleges that the prosecution's evidence in COLCOR failed to demonstrate that any voters had been paid or that "anything other than a somewhat unrefined political organizing had occurred." It notes that a bribery charge against the Lieutenant Governor "failed in its proof" and that the COLCOR operation led to the newspaper headline "Scandals Staining North Carolina's Good Name." The report concludes that neither the results in the COLCOR "prosecutions" nor other evidence substantiated the "broadsided attack on the integrity" of North Carolina's institutions.

What the report and other critics inexplicably fail to mention is that in COLCOR 40 individuals were indicted and 38 were convicted. Among those convicted were a state district judge, the Chairman of the Columbus County Board of Commissioners, a police chief, and a state senator.

COLCOR does not display a "particularly egregious example of the FBI's insensitivity," nor does it document the FBI's undermining of public confidence in public institutions. On the contrary, by successfully attacking corruption the COLCOR undercover operation and others like it aid in restoring the public's confidence in local and state government. Additionally, COLCOR demonstrated that constitutional rights and privileges can be protected during a sensitive investigation of public corruption.

RESPONSES BY ASSOCIATE ATTORNEY GENERAL JENSEN TO QUESTIONS SUBMITTED BY SENATOR JEREMIAH DENTON

Question No. 1. If changes or modifications to the Attorney General Guidelines for Undercover Operations are deemed necessary, which component within the Department of Justice would initiate the action?

Response to question No. 1. Whichever component perceived the need for change would most likely initiate the action. In most cases, it would be the FBI.

Question No. 2. Please describe the process by which such changes to the guidelines would be made?

Response to question No. 2. There is no formal procedure by which changes to the Guidelines would be accomplished. The likely scenario is that the component that perceived the need for a change would draft a proposal. A group composed of representatives from the Office of the Attorney General, the Criminal Division, the Office of Legal Counsel, and the FBI would then meet to consider the proposal, and prepare a formal recommendation to the Attorney General.

Senator MATHIAS. Thank you, Mr. Jensen. I proposed that we let Judge Webster make his summary, and we will ask you both questions.

STATEMENT OF WILLIAM H. WEBSTER

Mr. WEBSTER. Thank you, Mr. Chairman, members of the committee, I am pleased to appear before you this morning to discuss S. 804, the Undercover Operations Act. The topic of undercover operations is one of crucial importance to the FBI, and one on which I and other FBI officials have provided testimony on numerous occasions before the Senate Select Committee on Under Cover Activities and the House Subcommittee on Civil and Constitutional Rights. I appreciate the opportunity to do so again.

Before addressing the specifics on S. 804, I would like to reiterate a few points from my previous testimonies with regard to undercover operations.

First, as the Senate select committee recognized in its report, the undercover technique, properly utilized, is a lawful and indispensable investigative tool. The legality of the technique has been repeatedly affirmed by courts, including the U.S. Supreme Court. Judicial acceptance of the undercover technique was reaffirmed in the Abscam cases; all 20 convictions remain solidly intact despite lengthy appeals.

As to the importance of the undercover technique, let me say that while the traditional direct approach to criminal investigation of having our agents knock on doors, identify themselves and ask questions, conduct crime-scene searches, or examine documents is usually successful in bank robberies, embezzlements, kidnapings and many other crimes, these techniques are only marginally successful in organized crime and consensual crimes such as narcotics trafficking and public corruption. In these areas of criminal endeavor, which include some of our highest priority investigations, the crime occurs in a shroud of secrecy: Often the only "victim" is the general public, witnesses either do not exist or are hesitant to come forward. The use of sensitive techniques such as undercover special agents is absolutely essential to penetrate this veil of secrecy.

Second, as we increasingly employ the undercover technique in our priorty investigative areas, we remain cognizant of the risks inherent in its use. In an effort to minimize these risks, we implemented internal control mechanisms. This includes the application and reevalution, as necessary, of the Attorney General's Guidelines on Undercover Activities, which were promulgated in December 1980. Also, the Criminal Undercover Review Committee, comprised of lawyers from diverse backgrounds both at the Bureau and at the

Department of Justice, as well as supervisory officials, scrutinizes all group I undercover operations. The committee's review of the proposals is meticulous and in no way constitutes a "rubber stamp." Further, in the past 6 months, a working group within the Bureau has been reevaluating the guidelines to determine whether additional controls are needed, including consideration of various recommendations made by the Senate select committee.

We must, furthermore, be publicly accountable for our use of undercover operations, and we view our appearances before Congressional Oversight Committees as useful in our constant evaluation of the efficacy of our control efforts.

My final introductory point is that our undercover operations have been highly productive. While statistics alone cannot tell the whole story, they can be illuminating. In fiscal year 1983, undercover operations led to recoveries worth more than $81 million and prevented substantial losses to the public. Convictions arising from these operations last year totaled over 1,000. This was achieved on a total undercover budget of $8.8 million, exclusive of personnel costs. I think we continue to give the American people a solid return on the undercover investment. And perhaps more importantly, these successes come largely in high priorty investigative programs such as organized crime where traditional investigative techniques used alone simply are not adequate.

Mr. Chairman, my reading of S. 804 is that it seeks to address a number of the potential pitfalls inherent in the use of the undercover technique. It would specifically authorize undercover operations and mandate guidelines for their conduct; provide permanent exemptions from law that would otherwise severely restrict undercover operations; establish standards and limits for the initiation and conduct of undercover operations; provide a civil cause of action against the United States for negligence or violation of law that occurs during the conduct of undercover operations; require detailed annual reports to Congress and define the affirmative defense of entrapment. While the goal of S. 804 is admirable, it is my judgment that certain provisions of the bill would have a serious adverse impact on the use of the undercover technique.

Section 3801 of the proposed legislation authorizes the Attorney General to have Department of Justice law enforcement components conduct undercover operations and mandates a set of guidelines which establish procedures to be employed in those operations. The guidelines would also establish an Undercover Operations Review Committee for each agency conducting undercover operations. The section further requires the Attorney General to submit in writing to the Senate and House Committee on the Judiciary, at least 30 days before promulgated, every undercover guideline issued and every amendment, deletion, or formal interpretation of any such guideline.

I believe the Attorney General has the statutory authority to direct undercover operations by virtue of his authority to appoint officials to detect and prosecute crimes against the United States. Therefore, no additional legislation providing that authority is necessary. The FBI has worked closely with departmental personnel to develop the kind of guidance necessary to promote effective and efficient investigations; however, on the question of whether the Attorney General should be required by statute to issue, maintain and enforce guidelines, I defer to the Attorney General. We interpose no specific objection to the procedures and standards outlined in section 3801(B) (1) through (5). We do, however, object to section 3801(B)(6), which requires the presence of an Assistant Director of the FBI on each Undercover Operations Review Committee. We favor the existing procedure, which calls for the committee to consider proposals and thereafter make recommendations to an Assistant Director. Since the Assistant Director of the Criminal Investigative Division currently has the authority to approve or reject most undercover proposals, requiring him to be a member of the committee would be superfluous. With regard to non-FBI undercover operations, we think it inappropriate for an Assistant Director of the FBI to serve on a committee within other law enforcement components of the Department of Justice.

We certainly have no objection to responding to congressional requests regarding the manner in which we interpret the Attorney General's guidelines. We assume, however, that the term "formal interpretation" in the bill, refers to matters of general application of the guidelines rather than day-to-day application of the guidelines to specific cases. But we are troubled by any requirement that Congress be notified 30 days in advance of every formal interpretation of the guidelines if it would result in the delay of ongoing investigations.

I would support the provisions of subsection 3802 (A) through (D) subject to the following amendments. I recommend that subsection 3802(C) be amended to authorize law enforcement components to use proceeds generated by proprietaries, to offset not only the expenses of the proprietary but also to use those proceeds and any other proceeds generated by the undercover operation to be used to offset the necessary and reasonable expenses of that operation. In addition, I propose that subsection 3802(D) should be expanded to authorize depositing in banks and other financial institutions not only funds appropriated by Congress for undercover operations, but also the proceeds of the undercover operations. These authorizations are currently provided by Public Law 98–166, the Department of Justice and Related Agencies Appropriations Act of 1984, but will expire on September 30, 1984. Their enactment into title 18 would ensure no lapses in these important authorities as has previously occurred.

We oppose the provisions of section 3803, which establishes certain threshold requirements for the initiation of undercover operations and for the offering of inducements to engage in criminal activity. We fully agree that there must be prediction for the establishment of an undercover operation. However, we believe that the proper vehicle for setting investigative thresholds is the Attorney General's guidelines.

The advantages of guidelines are that they provide the flexibility to permit appropriate responses to the specific situations which arise in the context of the investigative field. For example, a narcotics case can involve fast-breaking events on the streets; important cases could be lost if a narcotics undercover agent is kept from acting on a situation before it evaporates. Investigative guidelines provide us with the flexibility to deal with these situations while at the same time observing the fundamental constitutional guarantees of the fourth and fifth amendments. Furthermore, we are concerned that, notwithstanding section 3803(E), which stated that "failure to comply with the provisions of this section shall not provide a defense in any criminal prosecution or create any civil claim for relief," statutory enactment of an investigation threshold requirement may result in endless pretrial litigation in the form of notions to suppress evidence.

In addition, the application of certain of the standards contained in section 3803 could be overly broad. For example, the requirement in section 3803(A)(1) that we must have reason to suspect that an "individual has engaged, is engaging or is likely to engage in criminal activity" before we can use the undercover technique to obtain information about an individual, could be read to preclude the use of routine "pretext interviews," where an FBI agent uses an alias or cover to conceal his relationship with the FBI, to obtain information at the preliminary stage of an investigation.

Similarly, the FBI questions the establishment of a probable cause standard in sections 3803(A) (3) and (4), although the standard only applies in limited situations. Generally, the probable cause standard refers to the amount and quality of evidence required for the issuance of a warrant for a search or for the arrest of an individual. This standard is simply too high of a threshold for the initiation of an investigation. It is often only through the use of the undercover technique that we can acquire that level of certainty. Furthermore, unless we define the terms "political" or "religious" organizations, this section would be extremely difficult to apply, especially in undercover operations involving foreign counterintelligence and terrorism.

Proposed section 3804 would permit certain classes of persons injured as a result of undercover operations to file a civil suit under the Federal Tort Claims Act. For example, the Government would be made civilly liable for damages caused by cooperating private parties even when they violate their instructions and hide their wrongful conduct from the Government. While the FBI supports a rational indemnification program for truly innocent third parties who suffer losses as a result of undercover operations, in our view, the Government's liability should be tied more closely to the proximate cause of the injury. Further, we see no reason to address only those torts which may arise out of undercover operations. For some time, now, as the chairman knows, the Bureau and the Department have advocated an amendment to the Federal Tort Claims Act to make the act the exclusive remedy for torts committed by law enforcement officers acting within the scope of their authority. The amendment is contained in title XIII of the administration's proposed Comprehensive Crime Control Act of 1983. Instead of limiting amendments to the Federal Tort Claims Act to those claims arising out of undercover operations, we favor amending the act as the administration proposed to make it the exclusive remedy for common law and constitutional torts arising out of all investigations.

Mr. Chairman, I have additional concerns with other provisions of the bill, particularly those concerning entrapment and extensive reporting requirements, but these have been addressed by Associate Attorney General Jensen in his opening remarks. I would only add that the FBI has not only given scrupulous adherence to the prevailing law applicable to entrapment, but also applies rigorous self-imposed limitations on our undercover operations in that area. It would be unwise, however, to adopt these self-imposed limitations as legislative mandates.

In conclusion, I would simply say that it is not wise to address an evolving technique with some of the concrete legislation proposed here. I think the proper means of control is through the Attorney General's guidelines and congressional oversight. I previously proposed in testimony before the Senate Select Committee on Undercover Activities that as part of oversight, the Senate or House Judiciary Committee hold hearings on any matters they wish. In regard to the guidelines on undercover activities, we have six oversight committees any one of which can make it its business to be interested in those guidelines and their adequacy. We have been called to provide testimony on numerous occasions, each time, I think, learning more about the undercover technique. I do not believe, however, that the oversight role should be viewed as one of management. That is the responsibility of the executive branch. Finally, the constitutional issues are, of course, being overseen by the courts, as well as the Congress, and in this area I think we have established a good record.

While I cannot endorse all of the provisions of S. 804, I would like to extend my appreciation to the members and staff of the Senate Select Committee on Undercover Operations for the professional manner in which they conducted their investigation. We have studied the committee's report with great care and have disseminated it to each of our field offices for review.

I thank you and am now ready to respond to your questions, Mr. Chairman, with Associate Attorney General Jensen.

Senator MATHIAS. Thank you, Judge Webster. I think I would be remiss if I did not express the appreciation of the members of the select committee and of the staff of the select committee for your kind words about the way in which that investigation was conducted, and to say that that was in great part possible because of the high degree of cooperation that we got from the FBI and from the Department of Justice.

I also welcome those words in your written statement in which you said that we must be publicly accountable for our use of undercover operations. I think that is an accurate perception, but it is more important that you have that perception than that I have that perception, and I am glad that you said it.

I think you went almost too far in terms of generosity when you continued by saying that you viewed your appearances before the congressional oversight committee as useful in your constant evaluation of the efficacy of control efforts, but we accept that also.

Now, we will proceed under the 5-minute rule, and let me just return to the subject that Senator Specter raised, the question of reasonable suspicion which is, of course, the familiar standard under the fourth amendment and which is virtually the same standard that currently applies to most of the undercover operations under the FBI guidelines.

Phil Heymann, when he was Assistant Attorney General, very concisely stated the standard. He said, "We only initiate investigations and we only use the undercover technique when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur. We impose on ourselves the requirement not only because fishing expeditions may be unfair but also for the practical reason that they would be wasteful of our scarce investigative resources."

Now, I understand what Mr. Jensen has been telling us here this morning that there should be greater flexibility of the guidelines as contrasted with the relative inflexibility of statutes and the desirability of having some means of revising and improving guidelines.

But what circumstances would arise, as you see them, in which the FBI or any other agency would need flexibility when there was not a reasonable suspicion of criminal conduct? It seems to me that is the common sense of it.

Why do you need flexibility if there is not some reasonable suspicion?

Mr. **Jensen**. I think that the statement that has heretofore been made by Assistant Attorney General Heymann is still in effect. That is the way in which we approach the business of any criminal investigation. I believe in Judge Webster's testimony he indicated that the way in which one should address this is not by statutes that purport to direct themselves at undercover techniques as such but that direct themselves at the generic need of the Department of Justice and its component parts to conduct criminal investigations. It is inflexible to have simply an undercover technique kind of nexus rather than an investigative nexus.

We think that there must be a reasonable indication in order to carry out any undercover technique, and that is part of the existing guideline structure.

One of the things that happens when you put it into a statutory structure I think I should point out and I made the point that we now get ourselves into a situation where we are litigating the effect of statutory structure in terms of supression of evidence by violating it.

Part of the flexibility is in that the guidelines themselves do not impose that kind of a process problem in terms of working out cases. That may be a different point, but I think it is an important point to make.

Senator **Mathias**. But since as a practical matter you are adhering to that standard, why not just write it into the law?

Mr. **Jensen**. Well, you are writing it so that we now litigate the initiation of investigation in every instance. We are now at a point where we are not litigating the final kind of case in terms of whether or not we have found evidence to show beyond a reasonable doubt all the elements of crime, but we are now going back and litigating whether or not we should have initiated an investigation.

That is part of the problem of statutory versus guideline kind of activities. As far as the way in which these guidelines are crafted, one of the important points that I think we are making is that, as you look at these kinds of continuums, these are difficult continuums in the sense that saying the difference between reasonable suspicion, reasonable indication, probable cause are difficult issues.

But when you have now said to yourself that, for example, if a, quote, "political organization" needs a standard and a threshold of probable cause, that at least is a much higher standard than reasonable suspicion, and we disagree with that.

We think imposing that kind of a condition on the ability to go into an investigation of an organization by the use of an undercover technique is far too inflexible.

Senator MATHIAS. Do you have anything to add?

Mr. WEBSTER. No, I think that really covers it. Mr. Jensen makes the point that you invite litigation when you set a statutory standard even if you say it doesn't give rise to one.

We all know the experience. Government is now on trial in almost every undercover case. Particularly when the evidence that we produced is so convincing and inexorable that the only thing that is left for defense counsel is to put the Government on trial.

It protracts the litigation to have to go through this process of whether we had a reason to look into it. The person might be guilty, but that is not the point. You should not have been looking into him in the first place.

Senator MATHIAS. Mr. Jensen, you tell us that we have set the threshold too high in S. 804 for certain operations that run the greatest risk of interfering with first amendment rights or perhaps with privileged relationships. The bill would require probable cause to believe that an undercover operation is necessary.

I am sure that before this hearing is over we will hear witnesses who say that the bill makes it too easy to undertake this particular sensitive kind of operation. Now, what is the status quo on that?

Mr. JENSEN. In the guidelines that are a part of the hearing, that is, the existing guidelines, the manner in which this is approached is by recognizing that these areas are truly sensitive and that they become a part of what the FBI and the Department deem to be so-called group I activities that require a very high level approval and high level monitoring of the activity itself.

We use a guideline, then, to recognize the sensitivity and then to impose the kinds of discipline that a high level undercover operation requires. If you use the statute, you have now put in place in a statute a threshold that says before we could initiate an investigation into one of these areas that is protected, that we would have to have "probable cause" and that we would define the target of the investigation by use of such phraseology as I have said before, political or religious or words that are not otherwise defined.

In the present way of approaching this, we recognize that sensitivity. We use that sensitivity, and there we have a usefulness in terms of the flexibility. We can go far beyond and be very, very sensitive to those areas. If we are going to err on whether or not it should be into the Undercover Review Committee, we will do that, because we recognize sensitivity.

What you do in the statute is build in what amounts to a prohibition of any investigation in that area unless you have reached something called probable cause into something called a political organization.

The definition of probable cause perhaps has a better legal basis because it is used throughout the world of criminal justice, but that probable cause, as has already been pointed out, is the kind of thing that gets you a search warrant or gets you an arrest, which is way too far down the continuum of an investigation to be reasonable in terms of when you should start an investigation.

With both of those problems then, the area of probable cause which has gone down to the point where you have reached a point where you could arrest or search, which is far too, I think, into a criminal investigation to be a reasonable limitation, and the vagueness in terms of the definitions of those entities that might be affected, we would find ourselves by a statutory structure once again, just as the judge says, litigating what we did rather than what the defendant did.

Senator **Mathias**. My time has expired. Let me ask you if each of you would be willing to respond to some questions in writing for the record in order to conserve time of the committee.

Mr. **Jensen**. Certainly.

Mr. **Webster**. Yes, Mr. Chairman.

Senator **Mathias**. Senator Denton.

Senator **Denton**. Thank you, Mr. Chairman.

Mr. Jensen and Judge Webster, I share from the point of view of one having had to examine the effects of drug trafficking, terrorism on the interests of the United States, the general tenor of what you have said regarding the balance respecting the need to protect the rights of our citizens, of innocent people, and the duty to protect the lives and property of our citizens in general and particularly the security of our Nation and of our interests, I want to identify with the statement by Judge Webster, supporting a rational indemnification program for truly innocent third parties and so on, but I do want to delve more deeply into the balance which is affected by the connotations, nuances, the nearly 800 pages which comprise the Senate report, and in the House subcommittee report, specifically on page 18, there is an allegation made, apparently based on press reports, mentioned previously by me to the Congressman, that during the Operation Graylord, the FBI, "indiscriminantly bugged the chambers of a judge."

Would you please comment on the veracity of this allegation? Is it true? What about the response that he was bugged for too long, which was offered by Congressman Edwards?

Mr. **Webster**. I approach the answer to that question with a great deal of care and apprehension because I am sure that, Senator Denton, neither you nor I want us to be engaged in talking about a case that is currently in litigation.

To date, there have been, I think, one conviction and one plea of guilty in that case so far. I can assure you that the FBI has not, during my tenure, and I think I could probably make a broader statement, but I will confine myself to the last 6 years, we have not engaged in any electronic surveillance without the appropriate court order required by law.

The order under the Omnibus Safe Streets and Crime Control Act requires a minimization procedure to be filed with the court and observed and audited, and does contain in every instance a time limit, which I believe to be 30 days, so that we have been scrupulously following the law with respect to all our title III electronic surveillance cases.

Senator **Denton**. As I understand it, and I will ask either or both of you to comment on this, the Federal Rules of Procedure have no definitive standards with regard to an attorney-client privilege, journalist-source privilege, priest-penitent privilege and physician-patient privilege. In fact, if I am correct, I believe both the House and Senate Judiciary Committees rejected proposed Federal rules that would have defined those privileges in the Federal courts.

If S. 804 is adopted, then it appears that we would be effectively endorsing those privileges in a Federal criminal proceeding when we require a finding of probable cause whenever a Government agent poses as an attorney, physician, clergyman, or journalist against whom or by whom those privileges have in common law or by statute been asserted.

Is that a correct observation? Would we not be paying lip service to or recognizing in a pretrial proceeding a relationship such as attorney-client that does not necessarily give rise to an evidentiary privilege at a Federal criminal trial?

Mr. **Webster**. That may well be so, although I would comment that since we use undercover techniques in areas where traditional investigative techniques have failed or cannot be expected to have the long-term success, if we had the probable cause, we would not need the undercover operation. We would have probable cause to arrest or probable cause to search.

We hope that the undercover operation, properly supervised, will provide the probable cause necessary. We view those sensitive areas, as Mr. Jensen pointed out, with a great deal of sensitivity.

I can say to you that I am not aware of any instance in which the scenario of an undercover priest or an undercover lawyer or an undercover journalist has been used by the FBI in an undercover operation.

Senator **Mathias**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

Director Webster, when you comment about undercover operation properly supervised——

Mr. **Webster**. May I correct before you ask the question——

Senator **Specter**. You may so long as it is on Senator Denton's time.

Mr. **Webster**. I mentioned a lawyer situation, but not one in which we are dealing with privilege, because there may be some of that involved in Greylord, but that will come out in due time. Please go ahead, Senator. I am sorry.

Senator **Specter**. I was starting to pursue the comment that you made about an undercover operation properly supervised. When we listen to you, Director Webster and Associate Attorney General Jensen, with the professionalism and care that you exercise, there would be a very different approach were one of you to be supervising all of the undercover operations. The difficulty in practice is what happens far down the line when agents and investigators proceed and how they comport themselves and whether they really have a reasonable suspicion where the matters have been litigated and they have been upheld on your successful prosecutions and investigations. I commend you for those. The converse question arises, how many undercover operations were there which were not successful where there proved to be no basis ultimately for an investigation or no crime was found, and there may be a basis for an investigation and still not have a crime found.

However, if we knew about the ones which were not successful, we would be in a better position to evaluate perhaps in those cases whether there was a reasonable suspicion.

Do you maintain statistics, Director Webster, on the undercover operations which are not successful?

Mr. WEBSTER. I do not think we maintain them on the basis of success or nonsuccess as such. I have figures which show how many cases are pending at any given time, how many were opened during the fiscal year and how many were closed.

Some of those could be terminated on the basis of court action or closed because of an exercise of management judgment that they should be closed.

I would be happy to try to work out a protocol for exploring that question with the committee if we are able to produce those figures.

There are many reasons why you may terminate. You may terminate because you are simply unable to gather the evidence. The evidence sufficient to sustain a conviction in court may not come forward.

You might have a reasonable suspicion just as there are many ordinary criminal cases initiated which are closed because you cannot make them on street crimes and so on.

There are other cases in which, because of the nature or reliability or ultimate unreliability of some witness or cooperating witness or informant the conclusion is made by the U.S. attorney that the case cannot be made.

In terms of can we ascertain whether we should not have investigated a case for lack of any proper predication, I think those would be very few, indeed. My assessment and the assessment of my advisors is that there has always been predication in the cases that we have reviewed, particularly I am talking now about the Group I cases which come before the Undercover Review Committee.

There may be arguments or disagreements as to the nature and extent of that predication and whether or not the management judgment was properly exercised in a timely way in terms of when you close an investigation from time to time.

I know a question was asked about the *Graylord* case in Chicago, an investigation of corruption in the Cook County judiciary, and I can tell you that when the Senate select committee returned its report, one of the first things I did was send that report to Chicago for review in the field for predication.

That investigation predated the Senate select committee inquiry. I was very satisfied with the response that I received, and then I had the files brought back and rereviewed at headquarters, because there was some suggestion of headquarters review in the Senate Select Committee.

So that at least in terms of the current investigations of great sensitivity, I am absolutely satisfied that none of these were opened without proper predication under the reasonable suspicion standard.

But we would be glad to discuss to the extent that we can the reasons why we terminated particular investigations. Some have proved to be unproductive in terms of resources required to be committed, because we did not see an appropriate end on a cost benefits basis. But there are very few of those.

Senator SPECTER. I think it would be useful if you could provide the statistics on the number you have initiated and the number which were discontinued because the investigations were not successful.

[The following was received for the record:]

NUMBER OF GROUP I UNDERCOVER OPERATIONS

	Total initiated	Total closed as of June 30, 1984	Closed—successful	Closed—unsuccessful	Total pending as of June 30, 1984
Fiscal year:					
1982	20	16	13	3	4
1983	22	15	11	4	7
1984 (June 30, 1984)	33	8	6	2	25

The number of closed and pending undercover operations noted above represent those operations initiated in that fiscal year.

Note: These figures are for cases involving senstivie activities which are most closely monitored and do not include the less sensitive Group II cases which have been initiated at the rate of approximately 200 annually in recent years.

Senator SPECTER. Mr. Chairman, may I ask one final question?

Senator MATHIAS. Yes, if you have no further questions, you can complete on this round then.

Senator SPECTER. I would like to ask one more question, if I may.

Director Webster, has the requirement for judicial approval been unduly burdensome on the electronic surveillance issues which you referred to earlier and if not, why do you think that it would be unduly burdensome to have judicial approval on reasonable suspicion for an undercover operation?

Mr. WEBSTER. Senator Specter, the judicial warrant for title III, as you know, requires a finding of probable cause, and we have been able to make that. To initiate an investigation, the issue of reasonable suspicion, the threshold standard or reasonable suspicion of criminal activity develops from a number of sources, and it is the basis on which we try to develop information that will provide ultimately the probable cause if we need it for search or electronic surveillance or for arrest.

An undercover operation is an evolving scenario. It is not a discreet activity such as the interception of an electronic communication. It shifts and goes with the circumstances, and it is not a thick script. The undercover operatives have to operate within the framework of what an unsuspecting suspect will do or not do.

Those activities are, of course, reviewed and monitored by supervisors and others, but to ask us to come to a court for an assessment, I think not only would create delays but would involve the court prematurely in the criminal investigative process, a requirement that I do not think would be welcome by the judiciary or by the executive branch and one the necessity of which has not been established.

I cannot think of any instance in which a court review, even applying this standard which is not a familiar standard for the courts in issuing warrants, would have precluded some improper activity on our part.

It really puts the criminal justice system on its head to ask a court to make those assessments at that early stage. We are making the assumption, I think, in dealing with undercover operations that they are constitutionally intrusive. They are not constitutionally intrusive. They have been sustained by the Supreme Court for many, many years. They do not implicate constitutional issues in the sense that a search of a person's premises or the expectation of privacy obtains.

There are two people present in conversations, and there is no expectation of privacy warranting that type of early judicial supervision of our activity. I think that the Congress has a legitimate interest in making sure that we do not spend the resources committed to our care promiscuously or on the chance that something will show up or unfairly or unduly risk someone's reputation by the mere fact that we have conducted an investigation.

That can be addressed through guidelines and oversight rather than implicating the judiciary in the process at that early stage.

Senator SPECTER. Thank you very much, Director.

Thank you, Mr. Chairman.

Senator MATHIAS. I have just two questions I would like to ask now and then I will put the rest of my questions in the record.

Mr. Jensen, Judge Webster said that the FBI had not used undercover agents in the role of privileged persons in privileged relation, priests, journalists, or lawyers. Is that the common practice——

Mr. WEBSTER. No, I qualified that.

Senator MATHIAS. Yes, I got your qualification in the Greylord operation.

Mr. JENSEN. But I think that I should not speak for the judge. He can speak for himself certainly, but I think that his remark was directed at the issue of the existence of privilege and how that would be a problem within these guidelines.

There is no prohibition in terms of role playing.

Senator MATHIAS. Yes. But my question to you is have you done it?

Mr. JENSEN. The answer is yes, in certain circumstances under the Undercover Review Committee kind of guidelines. As I pointed out, we see that as an area of great sensitivity, and we approach it from that basis in terms of the control and in terms of the approval. We do not see it in terms of a basis of a prohibition.

Senator MATHIAS. In situations in which you have an agent who poses as a journalist, let us say——

Mr. JENSEN. I would not want—what we might do is——

Senator MATHIAS. I am going to ask you a very general question. If an agent poses as a journalist, what precautions would you take to minimize the possibility of interference with the first amendment rights? You may answer either hypothetically or on the basis of real experience.

Mr. JENSEN. As I say, that would be a part of any proposal that would include any such intrusive technique and any one that would involve sensitivity of impinging upon first amendment kinds of issues.

It would be a specific proposal that would have to be reviewed by the committee and it would have to be one that was looked through in terms of the kinds of things we talk about as far as minimization and control in terms of what would happen in the actual context of the investigative undercover technique itself, how it was played out. You would have to look at the specifics, the circumstances.

It would be one that would have to be addressed by the Undercover Review Committee in terms of their proposal. So it is an ad hoc situation in that sense. It would have to be one that depends upon circumstances.

It would be a very, very extraordinary circumstance where it would be necessary to approve anything of that nature. Part of the undercover review process is an evaluation of alternative techniques.

I think, as the judge has pointed out, there are extraordinary situations where that might happen and that we would have to address that in another context as to perhaps how it might play out in ongoing cases.

But the undercover review process would look at it in terms of exhausting alternatives and in terms of absolute control over the conduct.

Senator **MATHIAS**. You say it has been done. Are you referring to agencies other than the FBI?

Mr. **JENSEN**. I guess this gets into a problem about discussing pending kinds of cases, and I do not think it would be appropriate for public commentary at this time. Perhaps we could arrange in some fashion so that any kind of use of that technique could be presented to the committee in camera.

Mr. **WEBSTER**. I think I can say, because it is a matter of record, that we have used undercover agents in their capacity as lawyers purporting to be corrupt lawyers in a criminal setting. We have not used clergymen and we have not used journalists.

But I can envisage, as Mr. Jensen points out, a number of situations largely on the foreign counterintelligence side where it might be necessary to identify criminal espionage activity to utilize that type of technique, but we have never done so.

Senator **MATHIAS**. Well, I will leave the record as it is on that point, but one further question. Judge Webster, in your testimony, you suggested that time was not yet right because this is an evolving technique.

Well, we have learned by observation of nature that evolution is a process that continues. There is never an end to evolution. When will we reach a point that some guidelines are appropriate?

Mr. **WEBSTER**. Well, I think guidelines are appropriate right now. I think perhaps if I were to restate that point of my statement, there are two parts of it. Scenarios evolve. They are dynamic, and therefore, they are not as susceptible is I pointed out to Senator Specter, to discrete specific probable cause requirements.

Also, guidelines have that capacity to deal with evolution far better than statutory, locked-in-concrete provisions. I have been here 6 years now. I have been searching for modifications of the Freedom of Information Act, the Federal Tort Claims Act and a number of other things that I think are highly meritorious and the wheels grind very slowly.

I would hope that we could deal with perceived situations that need change more quickly in the guideline area and with the help of the oversight committees in addressing the adequacy or inadequacy of those guidelines rather than to be locked into a statutory framework.

Senator **Mathias**. Thank you.

Senator Denton.

Senator **Denton**. I, too, Mr. Chairman, have only very few questions left and will submit the rest in writing.

Mr. Jensen and Judge Webster, as you know, the final report on the Senate select committee that preceded the introduction of Senate 804 goes on for nearly 800 pages, 790 to be exact.

Much of that deals with alleged improprieties of the Department of Justice and the FBI during the Abscam operation. How would you assess Abscam overall in terms of improprieties and convictions, in other words, results?

It seems that all of those indicted were actually convicted and convictions have been upheld on appeal. Is there anything you would like to summarize, because that appears to be more or less the point of what we're involved with here?

Mr. **Webster**. Well, Senator Denton, I think you have already stated the results in the courts. All 20 defendants were convicted in 10 separate jury trials, and appeals have gone up through the process in three separate circuits of appeals numerous times and there is either 14 or 16 petitions for certiorari that have been denied in the Supreme Court.

In terms of impropriety, that is, legally impermissible conduct, I think all of those allegations have been addressed. Certainly on the issue of entrapment, it is quite clear that entrapment did not occur in any of those cases. In fact, in half of those cases, the defendants did not even claim entrapment. They said they simply did not get the money, and the jury determined otherwise.

That is not to say that we did not identify in the course of those inquiries areas of management and supervision, judgment factors that, in hindsight, we would do differently, but in those particular cases, they rose out of one of our earliest long-term undercover operations involving multiple defendants in many different areas and places.

It evolved not from a specific public corruption investigation but from a property crime sting operation that become more and more sophisticated as more and more corrupt public officials at various levels of government came into the activity.

We learned a lot in that case. I think the fact that the prosecutions have withstood so much scrutiny in the courts suggests that we did it pretty well. I would like to, if I had my druthers, I would say look at some of the other cases besides Abscam, too, while you are at it and not just the ones where we had management problems as we did in Corkscrew but ones that do not seem to find their way into the record, particularly in the House.

The *Corcom* case, in which over 165 county commissioners in Oklahoma have been convicted and half that number of suppliers have been convicted in a long-term undercover operation involving public corruption, has significantly altered the purchasing practices and contracting practices in that State and others who have looked at that case. That is a significant and worthwhile contribution to the welfare of our country.

Other individuals in public corruption cases have been identified, tried, and convicted. Some have been acquitted, but Abscam will, I think, take its place in history. I hope that in the process that other equally fine investigations well run, well managed that have withstood all the possible challenges, will not go overlooked.

Senator DENTON. Well, accurately or inaccurately, it is my often expressed opinion that in micromanagement you mentioned that in some cases separation of powers may be in question here.

I believe that micromanagement since about 1970 in these bodies has, in general, been the problem rather than than the solution in terms of much that has to do with our defense, our intelligence operations and with respect to the current situation in Central America.

So I have that conclusion. It is not a bias. I can justify it. A last question.

The AG guidelines for undercover operations were developed during the Carter administration and put into effect on December 31, 1980, near the end of that administration. Does the Department of Justice plan any changes to these guidelines based on the experience gained from Abscam, Corkscrew, or any other operations?

Mr. JENSEN. There have been some changes. Later in the year, in mid-1981 there were revisions that were based upon experience. So there has been some level of revision, and as Judge Webster has pointed out, this is a continual process, and experts within the bureau and the department now are looking at the guidelines continuously.

Also as has been pointed out, there is a flow of information that is continual as the Judge has pointed out. When the report was made, it was made available to the field so that the observations and the insight that came out of the hearings themselves would be part of the actual implementation of undercover operations.

Senator DENTON. With the red light on and with the chairman's indulgence, I just want a yes or a no to this. Do both of you consider those guidelines with their changes and other changes that you might bring into being adequate for the protection from the civil rights point of view?

Mr. JENSEN. Yes, I believe so, Senator.

Mr. WEBSTER. I certainly do, Senator.

Senator DENTON. Thank you, Mr. Chairman.

Senator MATHIAS. Thank you, Senator Denton.

Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

Gentlemen, I apologize for being late, and I am told we may, for the rest of the panels, have to either go later this afternoon or another time since at 12 we are to break.

Mr. Chairman, I would like to ask your permission and ask unanimous consent that an opening statement I have be placed in the record.

Senator MATHIAS. Without objection so ordered.

[The prepared opening statement of Senator Biden follows:]

PREPARED OPENING STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Mr. Chairman, I want to compliment you for holding this hearing today on the Undercover Operations Act of 1983. The distinguished list of witnesses gathered here demonstrates the serious need for revision in our statutory authority of undercover operations.

Our witnesses today will represent a variety of positions which will be useful to the subcommittee in deciding what action we should next pursue on this bill.

I welcome Congressman Edwards who has been a driving force in carrying out the House congressional oversight responsibilities for ensuring proper use of undercover operations. I believe his testimony on the recently completed report on FBI undercover operations will be helpful in crafting any changes we might feel are necessary in our bill.

I also welcome Judge Webster to whom I have the utmost respect. His fair and nonpartisan approach in directing his agency over the years has resulted in strong congressional support and confidence in his ability. I may not agree with everything he proposes and I'm sure he will be the first to admit that there have been some mistakes made, but no one can doubt his integrity and commitment to justice.

Mr. Jensen has demonstrated over the last 3 years a remarkable ability to move each year to a higher position in the Justice Department. Based on my dealings with him I can understand why the Justice Department thinks so highly of him and regularly sends him up to the hill.

I will be interested to hear the comments of Mr. Nash and Mr. Wheeler who know this legislation better than anyone. Their painstaking review of the ABSCAM case with the culmination of the Senate committee report has proven to be the cornerstone we are using in our consideration of this legislation.

Finally, I believe the testimony of Mr. Berman from the ACLU, Mr. Seigenthaler from USA Today and Professor Freidman will provide for the record the civil liberty and constitutional questions that must be raised in considering changes to undercover procedures. Their remarks are to be carefully reviewed before changes in undercover procedures are finalized.

Senator BIDEN. I have one question, and in the interest of time I will not belabor the point. It follows off of Senator Denton's last two questions which I think are relevant, and they relate to current guidelines.

Judge Webster and Mr. Jensen, I know you, Judge, from dealing with you all these years better than I know Mr. Jensen. I do not mean to imply I do not have high respect for Mr. Jensen. I do. But I know you well, and my view is shared by the overwhelming majority of our colleagues. We trust you a lot.

Mr. WEBSTER. Thank you.

Senator BIDEN. The Attorney General is a man who has been, I think, worthy of our trust in terms of leveling with us when we have asked for information. My concern about the present guidelines is that you have indicated that you are not going to stay forever in this job and you may be departing sooner than many of us would like.

The Attorney General has made it painfully clear that he does not want to stay around very much longer. So we are in a situation where we are working from guidelines, and the two most important law enforcement officers in the United States of America who have been husbanding those guidelines, are about to leave.

My concern is what impact will that have upon undercover operations? And how do we up here have any knowledge or confidence that the guidelines will be continued to be the same as they are now being enforced?

Mr. WEBSTER. I could comment. Maybe Mr. Jensen has some comment. I appreciate what you said, Senator Biden. I am from

Mark Twain country, and you know what he said about rumors. [Laughter.]

Senator **Biden**. I hope he was correct in your case.

Mr. **Webster**. The response I would make is that as long as the guidelines are publicly promulgated and are subject to oversight review and commentary, then the only question really remaining is the commitment to observe them.

I can tell you that the commitment to follow those guidelines within the FBI is deepseated and does not depend upon me or anybody else. Certainly we set the tone for that commitment, but I think that you can be very confident that those guidelines whatever they may be will be fully observed within the FBI.

So it becomes a matter between the Attorney General and the Congress as to what those guidelines will say.

Senator **Biden**. I understand that, Judge, but I have been around here 12 years now, and without either giving your credit or blame, let us shift gears a minute. I have been deeply involved, and one of the reasons why I was late this morning and why I am going to not be able to come back this afternoon is I am meeting with a group of your colleagues from the CIA, on a very important matter, a hearing that I have been trying to set up for sometime.

Now, I know, my colleagues up here know that it was because of you and other voices in the administration that the guidelines relating to conduct of agents and the conduct of business were not changed so significantly.

Although we up here are in a position to comment on them, a guideline is a guideline, and I'm concerned that there will not be a strong voice in this administration if you leave. This is where Senator Denton and I will disagree, in my view, but there is a real concern in pursuing the civil liberties sides of the guidelines under this administration. I do not want to ruin your reputation and call you a civil libertarian which I think you are, but when you and others are gone, a guideline is a guideline, and a guideline can be gone tomorrow.

I assume one of the concerns that the Senator from Maryland has with regard to pursuing this matter is that if the guidelines are good, and are making sense, why not codify them, because then the burden shifts the other way.

I have no problem with any administration coming up here and making the case to me as the ranking member of this committee, that the statutory requirement out there is not working because the world has changed.

You did that with FOIA. You had guys like me who were considered, "civil libertarians," supporting your changes. We changed them to the shagrin of some of the civil libertarians.

Now, I like that burden much better than I like the burden the other way. I was not as worried with you being there, and if you are going to continue to be there, I am less worried.

But I really do not like the idea that we, in fact, are going to be in a position where guidelines rely on, in effect, the willingness of individuals to enforce or not enforce them depending on individual personalities.

The last point I will make, is to you Mr. Jensen. I will propound it now and it need not be answered now because my time is up, but on page 6 of your testimony, you indicate the you strongly oppose section 3803. This section would import statutory limitations on the initiation of undercover operations and offering of an inducement or opportunity to commit a crime. Basically our objection to this part of the bill is that it imposes a specific inflexible standard on our investigative agencies and does not take into account the variety of situations arising from actual investigations.

It would be very helpful for us for you to detail some of those examples, and you may be able to convince me of the problem. I am not asking you to do it now, but it would be useful for the record to do that.

Mr. **Jensen**. I would be happy to do that, Mr. Chairman. If I may just briefly comment on the general subject matter Senator Biden raises. I think this is a very important kind of consideration because the ethics by which our law enforcement activities and the Department of Justice carries out its responsibilities are critical. I do not think there is any question about that.

The prohibitions that are built in, some of them are external prohibitions. They come about by guidelines. They come about by statutes or they come about by the exercise of decisions by courts.

There is also an internal kind of prohibition and ethical standards that are implicit in this. I think that I would answer and respond to this question that there is a tradition that is implicit and it is not a personal sort of thing. It is not a personal kind of ability to say that as you look at the kind of conduct and the ethical standards that have been used by the FBI and the Department of Justice over time that they are the kind of standards that I think the American public can rely upon.

Senator **Mathias**. Thank you very much.

I am disappointed that we have not covered quite as much ground quite as fast as I had hoped we would this morning, but that is a frequent experience.

Senator **Biden**. Speed is not consistent with excellence, Mr. Chairman.

Senator **Mathias**. Well, let us hope we have the compensation. I, therefore, have to ask the afternoon's witnesses if they will be patient and bear with us for an afternoon session. As Senator Biden says, he and I have some other committee commitments that we have to carry out.

I would propose that we recess at this point and resume at 2:30, and at that time, we will meet not in this room but in Dirksen 226.

[Whereupon, a luncheon recess was taken.]

Senator **Mathias**. Mr. Neal, I apologize for being a little bit late. I had to leave the Hill to go down to the Department of Transportation, and my transportation was not adequate.

Proceed as you see fit.

STATEMENT OF JAMES NEAL, ESQ., NEAL & HARWELL, NASHVILLE, TN, FORMER CHIEF COUNSEL, SENATE SELECT COMMITTEE TO STUDY LAW ENFORCEMENT UNDERCOVER OPERATIONS

Mr. **Neal**. Thank you, Mr. Chairman.

Like the others, I appreciate the opportunity to appear here and give my views on S. 804. Unlike the others, I have appreciated the opportunity to work with you and the other members of the Senate select committee studying undercover operations in the past. I will be very brief and answer any questions that the chairman might have.

Senator MATHIAS. We have your full statement and that will, of course, appear in the record.

Mr. NEAL. I would appreciate that, Mr. Chairman.

S. 804 addresses one of the most dangerous and, in respect to certain criminal activities, one of the most effective law enforcement techniques available today, the undercover operation.

In my view, the proposed legislation represents a modest but in my judgment necessary legislative intervention in law enforcement activities.

Mr. Chairman, you know the number of hours we put in studying Abscam and many other operations, and I will not belabor that. It seems to me, though, that as a result of these activities and studies, I came to four conclusions in this area, and I believe these conclusions were shared by the staff and by every member of the committee.

The first conclusion is that undercover operations and the use of undercover operations by law enforcement agencies will always be controversial, involving as it does the use of deception, trickery, subterfuge and the offer of the opportunity to commit a crime, followed by the arrest and prosecution of the offeree if the offer is accepted.

Some people will never accept the necessity or the morality of such conduct, irrespective of its effectiveness, and I might add the controversial nature of the operation extends to the controversy that surrounds any effort by Congress to deal in this area.

We have already heard this morning some people say that this bill does not go far enough, others say the bill goes too far.

The second conclusion reached in this investigation was that undercover operations are, in fact, extremely effective, at least in those areas of criminal activity in which there is no identifiable victim, rather society at large is the victim.

As an indication of the effectiveness of the operation, in 1983, 316 undercover operations were conducted resulting in 889 convictions and approximately $80 million of recovered property.

The third conclusion I think we all reached is that, and I suppose this is due to its effectiveness, the use of undercover operations has increased enormously in recent years. In 1977, the FBI conducted 53 undercover operations. In 1983, the number had expanded to more than 316.

The fourth conclusion I think we all reached was that while they are very effective, undercover operations do pose serious risks to those values we all cherish, privacy, civil liberties, property rights, and reputations of the innocent.

They pose, in my judgment, another risk, serious but somewhat lesser perhaps, and that is the risk of corruption of the agents involved. Law enforcement agents involved in undercover operations, unless carefully trained and monitored, ultimately may become what they have pretended to be in the execution of their undercover roles.

While we reached these preliminary conclusions, the committee and the staff reached the conclusion that the effectiveness of undercover operations nevertheless, outweigh their risks.

We then sought to determine if congressional action was necessary, and I think the conclusion was that it was. As a result S. 804 was proposed by the committee.

S. 804 suggests what seems to me a middle course between those who would leave the matter entirely to the existing judicial restraints and those who would allow use of this technique only after approval of a magistrate upon a showing of probable cause.

And S. 804, it seems to me, says, in effect, to the Department of Justice, "We confirm your right to continue to conduct undercover operations and we will give you the necessary tools to do the job. For the time being we will basically allow you to police yourself. You must keep in place certain guidelines, however, and those guidelines must contain certain safeguards both substantive and procedural."

Let me digress just a moment here to say that this morning the testimony was that existing guidelines now require reasonable suspicion before an opportunity to committee a crime is offered to an identified individual.

Mr. Chairman, in fact, they do not. As we found out in the course of our investigation, one of the problems with, for example, Abscam was that there was no reasonable suspicion. Whatever a corrupt middleman said or whomever a corrupt middleman said would take a bribe, they were brought in, in truth and in fact, willynilly.

Senator **Mathias**. In fact, in one case, as you well remember, it was kind of an afterthought. It was when one scenario broke down that another one was substituted.

Mr. **Neal**. Immediately and without any pause for reflection. So this bill does say, "You must have guidelines and these guidelines must contain certain safeguards both substantive and procedural. You must not change these guidelines without prior notice to our oversight committee and you must keep our committees fully apprised of your actions, and finally we will hold you accountable for any abuses."

S. 804 also provides a legislative basis for the defense of entrapment and one that is more logical and more easily applied than the existing doctrine.

I sincerely believe that legislative action is necessary and appropriate in this area, and I endorse the modest first step approach represented by S. 804. In fact, Mr. Chairman, the weakness of the bill is one that you have alluded to in the Congressional Record, and that is that it only pertains to components of the Department of Justice and does not take into consideration the enormously expanding undercover operations of other law enforcement agencies, for example, the Internal Revenue Service.

Mr. Chairman, before I stop, I would like to point out three things that were mentioned this morning that I think are inaccurate. No. 1, I have mentioned. The existing guidelines do not require reasonable suspicion that a person has committed, is committing or is about to commit a crime before he is offered the opportunity to commit that crime.

They simply do not. The loopholes are just too great. Our standards, this bill, S. 804, would impose three standards, and it would require, and I think this is critically important, it would require high level action, making findings, making written or articuable findings that before you conduct an undercover operation, before you authorize it, you find in writing and set forth the facts that there is reasonable suspicion to believe that the initiation of the operation would detect ongoing criminal activity.

Then before you get down to the very controversial part of undercover operations, that is, offering the opportunity to a citizen to commit a crime so you can apprehend him and punish him, you must find and you must detail in writing your findings that there is reasonable suspicion to believe that this individual, this specific individual has committed, is commiting or is about to commit a particular crime.

And then the third and one the committee will obviously find very controversial is the standard that before you can involve certain areas, that is, media, privileged communication areas, you must find probable cause to believe that the criminal activity is going on and that this is the only way to get at it.

There again, you must find the articuable grounds and you must set them forth in writing.

And finally this bill would change, as I said, the law of entrapment. I think the law of entrapment now is illogical, as about four members of the Supreme Court have, at various occasions, articulated.

This law would put the emphasis on the nature of the law enforcement activity, and it would allow the judge to determine whether there is entrapment.

Thank you, Mr. Chairman. I appreciate the opportunity to appear before you. I wholeheartedly endorse this bill in recognition that it can be improved enormously, should be improved enormously through the factfinding process of committees.

But I can assure you as a man who has worked many years both as a prosecuter and now as a defense counsel, it is an area of considerable controversy in the country. Some people applaud undercover activities. Many people say they should be eliminated altogether.

But I think most would concur that some legislation is necessary. Thank you, sir.

[The prepared statement of Mr. Neal follows:]

PREPARED STATEMENT OF JAMES F. NEAL

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Senate Bill 804 addresses the most dangerous, and in respect to certain criminal activities, the most effective law enforcement technique available today -- the undercover operation. This proposed legislation represents a modest, but in my judgment, necessary legislative intervention in law enforcement activities.

For much of 1982, I was Chief Counsel to the United States Senate Select Committee on undercover operations. This Committee, chaired so ably by Senators Mathias and Huddleston, was created in response to the criticisms and praises heaped upon the most ambitious and publicized undercover operation to date -- ABSCAM. The work of the Committee, however, was not limited simply to a review of that operation. In recognition of the increased use of this technique, as well as the controversy surrounding it, the Committee reviewed tens of thousands of records generated in a number of undercover operations, interviewed and took the testimony of Department of Justice personnel involved in these operations, both field operators and supervisors, solicited and heard the views of legal experts, analyzed the in-house Department of Justice regulations pertaining to undercover operations and reviewed the existing judicial restraints on this technique.

As a result of this investigation, I reached certain conclusions regarding the use of undercover operations in federal law enforcement and I believe these conclusions were shared by most, if not all, members of the Senate Select Committee and the staff.

First, the use of undercover operations by law enforcement agencies will always be controversial, involving as it does the use of deception, trickery, subterfuge and the offer of an opportunity to commit a crime followed by the arrest and prosecution of the offeree if the offer is accepted. Many lay persons and some experts will never accept the necessity or the morality of such conduct, irrespective of its effectiveness.

Second, undercover operations are in fact extremely effective, at least in those areas of criminal activity in which there is no specific victim to complain. I include in these areas drug trafficking, official corruption and the activities of organized criminals. In these areas, society rather than an identifiable person is the victim and the criminal activity supplies a demand. Neither the supplier nor the person whose demand is being accepted generally will complain. The effectiveness of these operations may be demonstrated by a brief review of FBI statistics. In 1983, 316 undercover operations were conducted with an appropriation of $7,800,000 resulting in 889 convictions and $81,515,988 of recovered property.

Third, and I suppose due to its effectiveness, the use of undercover operations has increased enormously in recent years. In 1977, the FBI conducted 53 undercover operations. In 1983, the number had expanded to 316.

Fourth, undercover operations do pose serious risks to those values we all cherish -- privacy, civil liberties and property rights. They also pose a lesser, but still serious risk, of corruption of the agents and agencies. Law enforcement agents involved in undercover operations, unless carefully trained and monitored, ultimately may become what they have pretended to be in the execution of their undercover roles.

With these findings in mind, the Committee nevertheless concluded that the effectiveness of the undercover operation technique outweighed its risks. The Committee then sought to determine if congressional action was necessary or advisable. The Committee reviewed the judicial restraints imposed on most undercover operations, that is, the concept of entrapment and of due process of law. The Committee was also made aware of the recommendations of some scholars that undercover operations, or at least that part of these operations involving the offer of an opportunity to commit a crime, be preceded by a judicial warrant issued only upon a showing of probable cause.

In sum, I believe the Senate Select Committee made a thorough and scholarly study of the concept of the undercover operation, the risk and effectiveness of this technique, the existing restraints and the arguments pro and con respecting such law enforcement activities.

After this review the Committee proposed Senate Bill 804. This bill suggests a middle course between those who would leave the matter entirely to existing judicial restraints and those who would allow use of this technique only after approval of a magistrate upon a showing of probable cause. Senate Bill 804, in effect, says to the Department of Justice, we confirm your right to continue to conduct undercover operations and we will give you the necessary tools to do the job. For the time being, we will basically allow you to police yourself. You must keep in place certain guidelines, however, and these guidelines must contain certain safeguards, both substantive and procedural. You must not change these guidelines without prior notice to our oversight committees and you must keep our committees fully apprised of your actions. We will hold you accountable for any abuses. Senate Bill 804 also provides a legislative basis for the defense of entrapment and one that is more logical and more easily applied than the existing judicial doctrine.

I sincerely believe legislative action is necessary and appropriate in this area and I endorse the modest first step approach represented by Senate Bill 804. In fact, in my view, the weakness in the Bill is that it only pertains to the components of the Department of Justice and does not take into consideration the enormously expanding undercover operations of other law enforcement agencies, for example, the Internal Revenue Service.

Thank you for the privilege of appearing before you today.

Senator MATHIAS. Well, Mr. Neal, you have maintained your reputation today for long cigars and short statements.

Mr. NEAL. Thank you, sir.

Senator MATHIAS. Let me ask you this. You recommended to the select committee that a warrant not be required. As you know the House committee came to the opposite conclusion. Do you want to set forth the basis of your views since that was controversial today?

Mr. NEAL. Yes. Mr. Wheeler, who worked with me and then succeeded me, and I spent long hours in the evening in the Russell Building debating this. While he started out, I think, with the idea that that should be done, we both concluded to recommend to the committee that, at this time at least, that not be undertaken.

And the reasons are as follows. One, practical. I do not think it can be done right now. But more than that, you are engaging the judiciary, in our judgment, too early in the law enforcement activity.

You are bringing them in right at the beginning, almost in the initiation of an investigation.

Second, I do not conceive of any way right now that you can present and the judge can rule upon the matter with the precision and yet the flexibility necessary to have effective undercover operations.

When you go in for a search warrant, for example, you can point out to the court, "We are going to search apartment 401. It consists of three rooms, and we are going to search for and seize certain items."

When you come into the area of undercover operations, the judge cannot be sufficiently detailed in that area to have it meaningful, on the one hand, and give the necessary flexibility to the operators in the field, on the other.

And at this point, I would not further burden the committee with this. I would give, as I say, this modest first step, an opportunity to work before I would impose the burden of a warrant.

Senator MATHIAS. Well, that tends to be my own feeling on the subject. I think Judge Webster is right that we are in an evolving situation but the law can evolve as well as administrative practice can evolve.

There has been some confusion in the discussion of this whole subject about the legal effect of a violation of administrative guidelines or of statutory standards.

The select committee had in mind the doctrine that violation of an administrative guideline on investigative techniques would not be the basis for a motion to suppress evidence that was obtained as a result of that investigation.

Is that your recollection?

Mr. NEAL. As a matter of fact, it is written precisely in the law in the proposed bill as I remember. In the case of the *United States* v. *Caceres,* the Supreme Court said that violation by an agency of its internal guidelines does not create any rights on behalf of the accused.

For the time being, I believe it was the committee, the select committee's view that again we should not be creating additional rights, at this point, on behalf of the accused, if the guidelines are violated.

The whole point of this is if we find these abuses, that may be down the road, but at the present time, this bill, mandating guidelines, would not create, expressly would not create a defense if those guidelines were, in fact, violated. I do not believe that this bill would change the law with respect to that.

Senator MATHIAS. You heard this morning when Mr. Jensen criticized Senate bill 804 because it established a higher threshold standard on cases in which the undercover operation may interfere with privileged relationships.

Mr. NEAL. Well, I think, Mr. Chairman, you are going to hear a great deal of objection to the fact that in that area we did not go far enough. It does, however, impose a higher standard.

In certain extremely sensitive areas of first amendment rights, for example, it requires a written, articulated finding of probable cause to believe that criminal activity is going on in this area and that this is the only way to detect and prosecute that activity before undercover activity is taken in that area.

Yes, it does impose a higher standard, but it is a standard that is, in my judgment, needed, and as I say, you will hear, I think, when my good friend Mr. John Seigenthaler gets up here, you will hear that we do not go near far enough in this area.

But I think that we do take impose a higher standard. I think it is necessary.

Senator MATHIAS. So what you are really saying is that if you have sort of a run-of-the-mill sting operation or a buy-and-bust drug operation, that that can be operated at a different level of sensitivity compared to an undercover investigation which is targetted at a newsroom, a church, or a judicial system.

Mr. NEAL. Yes, Mr. Chairman. If I might take just one moment, Mr. Chairman, to point out what I was looking for here. It says:

> When a government agent, informant, or cooperating individual poses as an attorney, physician, clergyman, or member of the news media and there is a significant risk that another individual will enter into a confidential relationship with that person, there shall be a finding that there is probable cause to believe that the operation is necessary to detect or prevent specific acts of criminalty.

And then another portion says that those findings must be made in writing, yes, on page 11:

> All findings required to be made by this section shall be in writing and shall inclde a statement of the specific facts or circumstances upon which the finding is based.

That is a higher standard than is now in the law but one I think is absolutely required. At least that much is required and the Chair will remember the problems we had in the investigation that the requirement of a finding in writing of specific facts before somebody is offered an opportunity to commit a crime is one of the real frailties we found in the Abscam operation.

Senator MATHIAS. This morning we ran out of time before I had the chance to ask the Justice Department panel about their reactions to the news that the chief informant, chief prosecutor, and one of the FBI agents in the Abscam case had apparently collaborated to run a private undercover operation for a leathergoods concern that was investigating alleged counterfeiters.

Now, the counterfeit problem is a serious problem and we are considering it in this committee in another context. But do you have any thoughts to add to the propriety of that particular enterprise and by the participation in it of both a former and a future FBI agent and of a character like Mel Weinberg, whom you and I remember?

Mr. NEAL. Yes. It certainly was a reunion for a number of people who spent a lot of time together in the past. The Chair knows and reflects and remembers with me that one of the problems of an undercover operation and one of the problems I think that will be encountered in every one is the fact that you sometimes have to operate with characters like Weinberg.

It is a frailty and it is a risk. It is one that sometimes must be undertaken, but can be undertaken only if it is severely monitored pursuant to guidelines. Two things surprise me about the article I read on that matter the Chair mentioned.

One is I was surprised that the court would get involved in investigating crime rather than refer that to the U.S. attorney, and second: I think it is very dangerous to have those kind of operations where there absolutely are not guidelines in respect to what is done.

Whether those guidelines are informal, legislatively mandated or not, but here there are none.

Senator MATHIAS. The select committee reconciled itself to the fact that the people that were going to be used in these operations were not always going to have impeccable reputations and pure life experiences because it is, in fact, the nature of their life experience that makes them usable and useful but there must be some limits.

Mr. NEAL. There must be some limits, and it makes it even more imperative that these highly effectively and highly dangerous techniques be carefully controlled.

Senator MATHIAS. Since everyone who reads this record may not have read the news story on that leathergoods case, I will, at this point, put in the record the article from the New York Times, which appeared in the May 4 issue.

[The following was received for the record:]

[From the New York Times, May 4, 1984]

LEATHER GOODS CONCERN USED A STING OPERATION

(By Leslie Maitland-Werner)

WASHINGTON, May 3.—The Louis Vuitton leather-goods company hired a former Government informer as part of an undercover sting operation against suspected counterfeiters of its products.

The informer, Melvin Weinberg, played an integral role in the Federal Bureau of Investigation's Abscam operation, which led to the convictions of a Senator and six Representatives on a variety of corruption charges.

In this case, however, Mr. Weinberg's aim was to seek out those responsible for threatening the famous Louis Vuitton trademark.

The company's lawyers retained as a consultant Thomas P. Puccio, the former chief of the Organized Crime Strike Force in Brooklyn, who supervised the Abscam inquiry and has since gone into private law practice.

OPERATION UPHELD BY JUDGE

The unusual private sting operation came to light after a Federal judge in New York upheld the use of the sting operation by Louis Vuitton et Fils S.A. to gain evidence against suspected counterfeiters of its products.

Its undercover operation involved the same techniques that have been used with increasing frequency by Federal law enforcement agencies to unravel complex criminal conspiracies.

Gunnar Askeland, and F.B.I. agent involved in Abscam, helped run the operation, in which evidence against suspected counterfeiters was surreptitiously gathered on audio- and videotape. At the time, Mr. Askeland had left the bureau to run his own private investigation firm in Florida. He has since rejoined the F.B.I.

ACCUSED OF CRIMINAL CONTEMPT

In order to run the operation, two of the company's lawyers, J. Joseph Bainton and Robert P. Devlin, were designated by the Federal Judge Morris E. Lasker of Federal District Court in Manhattan to serve as Government prosecutors, both to conduct an inquiry and to present evidence to a trial jury. Mr. Bainton and Mr. Devlin are with the firm of Reboul, MacMurray, Hewitt, Mynard & Kristol.

"To the best of my knowledge," Mr. Bainton said, "this is the first time in which specially appointed private attorneys have been authorized by a court to conduct an undercover sting-type investigation."

As a result of the evidence collected in the operation, Judge Charles L. Brieant of Federal District Court in Manhattan charged seven defendants with criminal contempt.

They were charged with the crime because two of the same defendants, in an earlier civil case brought by Louis Vuittin, had agreed to a settlement including a permanent injunction that barred them from producing or distributing goods made with the Company's distinctive material. The other five were charged with aiding and abetting the original two in violation of the court's permanent injunction.

The Vuitton material—brown vinyl with a gold insignia bearing the initials L.V.—is used to produce expensive handbags, accessors and luggage. A typical sachel-style handbag for women costs about $180, while counterfeit models of the bag may be sold at prices ranging from $30 to $180. The quality, however, is often inferior to the real thing, and the company contends this has damaged its reputation.

A decision last month by Judge Brieant rejected the defendants' contention that the company's lawyers had been granted overly broad jurisdiction when Judge Lasker designated them as temporary government prosecutors.

SUFFICIENT AUTHORITY

In his decision, Judge Brieant said Rule 42 of the Federal Rules of Criminal Procedure "confers sufficient authority upon the court to authorize a special prosecutor to undertake the activities performed in this case."

Judge Lasker's order permitted Mr. Weinberg, using the name Mel West, to masquerade as a gambling-casino owner who wanted to join the counterfeiting business.

In secretly videotaped meetings with some of the defendants in the Beverly Wilshire Hotel in Los Angeles and the Plaza Hotel in New York City, Mr. Weinberg helped gain evidence of the enterprise and even visited one of its factories in New Haven, according to information presented to the court.

Mr. Bainton and Mr. Devlin were ordered by the court to inform the United States Attorney's office in Manhattan of their operations. They were also required to enlist the assistance of the District Attorney's office in Los Angeles in order to conduct electronic surveillance there.

In a telephone interview, Rudolph W. Giuliani, the United States Attorney in Manhattan, said: "I think it's a mistake generally for private people to be conducting sting operations. Citizens affected by the operation don't have the same protection as do those affected by the Government, where the Bill of Rights applies."

He added that this case was somewhat different because it was "done under the auspices of a judge."

Senator **MATHIAS**. I am very grateful to you for being here, but doubly grateful that you inconvenienced yourself to stay for an afternoon session, and the fact that you have carried the load without Malcolm Wheeler. We regret that he is ill, and I will put his prepared statement in the record.

[The prepared statement of Mr. Wheeler and the response question from Senator Denton follow:]

PREPARED STATEMENT OF MALCOLM E. WHEELER

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I greatly appreciate your invitation to appear before this Subcommittee to testify regarding S. 804, the Undercover Operations Act.

In 1982, while serving first as Deputy Chief Counsel and then as Chief Counsel to the Senate's Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, I had the opportunity to examine in depth the policies and practices of federal law enforcement undercover operations. In particular, I had the opportunity to review confidential and public documents prepared in connection with six undercover operations, to interview numerous representatives of law enforcement components of the Department of Justice who conducted those operations, and to participate in the examination at Select Committee hearings of several of those representatives. I also had the opportunity to study, and to interview and examine Department of Justice representatives concerning, the Attorney General's Guidelines on FBI Undercover Operations, on FBI Use of Informants and Confidential Sources, and on Criminal Investigations of Individuals and Organizations.

Against that background, I concluded that there existed, and I still believe that there exists, a critical need for legislation expressly authorizing, but carefully circumscribing the scope of, undercover operations by law enforcement components of the Department of Justice. I also believe that S. 804, if enacted, would achieve those two goals in a manner that would strike a proper balance between effective law enforcement and the preservation and nurturing of civil liberties. In support of that opinion, I offer the following specific comments about portions of S. 804.

SECTION 3801: DEPARTMENT OF JUSTICE GUIDELINES

Section 3801(b) would require the Attorney General to issue, maintain, and enforce guidelines governing the initiation, extension, renewal, expansion, and termination of undercover operations of law enforcement components of the Department of Justice. There already exist guidelines issued for the Federal Bureau of Investigaion by the Attorney General that would comply almost fully with Section 3801(b). The existing Drug Enforcement Administration guidelines (at least as of mid-1983), however, are less complete and would have to be further developed; and the Immigration and Naturalization Service (at least as of mid-1983) has no guidelines that apply to the entire Service.

Given the intrusive nature of undercover operations, the threat they present to civil liberties, and the problems of management, review, and oversight inherent in their nature, it is important that there be clear and encompassing guidelines governing all such operations. Former Attorney General Civiletti promulgated undercover guidelines while he was in office on January 5, 1981; and the Attorneys General who have succeeded him have maintained those guidelines. Nevertheless, the fact remains that some other Attorney General at some future time could, absent a provision such as Section 3801(b), conclude that the guidelines are an undue hindrance to effective law enforcement and could withdraw them in whole or in part; and the further fact remains that the guidelines applicable to the FBI constitute the only thorough set of guidelines governing undercover operations, even though the DEA and the INS have been conducting such operations for years, and even though the problems of management, review, and oversight and the risks to civil liberties presented by DEA and INS operations are as great as those presented by FBI operations.

Section 3801(b) would ensure that all law enforcement components of the Department of Justice would establish, maintain, and enforce guidelines governing all major aspects of undercover operations, yet it would leave the exact content of those guidelines to the discretion of the law enforcement officials most knowledgeable about the nature of law enforcement activities. If future experience should reveal an unwillingness on the part of the Attorneys General to issue, maintain, and enforce guidelines sufficient to prevent serious errors or abuses in undercover operations, it may then be appropriate to establish legislative requirements for the initiation, extension, expansion, renewal, and termination of such operations. Unless and until that infelicitous moment arrives, however, it seems preferable, on balance, to permit the Department of Justice to exercise its informed discretion within a broad framework provided by the Congress. This is the balance struck by Section 3801(b).

Section 3801(b)(6) warrants special mention. It specifies that each law enforcement component of the Department of Justice that conducts undercover operations must have an Undercover Operations Review Committee consisting of at least six voting members, at least one of whom is an Assistant Director of the FBI and at least one of whom is a representative of the Office of Legal Counsel of the Department of Justice. This provision would achieve several salutary results.

First, it would ensure that each law enforcement component conducting undercover operations would have a review committee similar to that which has been in operation at the FBI for several years and which has served the function of providing ongoing review of undercover policies, practices, and operations. Testimony and interviews given by FBI officials has persuaded me that ongoing review of all undercover operations by a small group of officials with varied law enforcement backgrounds is the optimal mechanism for identifying potential problems and for amending undercover proposals in a fashion designed to solve those problems most effectively.

Second, by requiring that an Assistant Director of the FBI sit on each such review committee, the provision would ensure that a high-level official of the FBI would receive relatively undiluted and undistorted information before being asked to approve the initiation, expansion, renewal, or termination of an undercover operation. This will thereby mitigate one of the problems revealed in my study of ABSCAM and other undercover operations--namely, because of the number of reporting levels through which information about proposed actions was sifted, the Assistant Director asked to authorize the initiation or expansion of undercover operations often did not receive information that, had he known it, may have caused him to make further inquiries or to refuse authorization.

Third, the testimony of representatives of the FBI, the DEA, and the INS before the Select Committee revealed that each of those components of the Department of Justice conducts its own undercover operations, but that the FBI sometimes participates jointly with the DEA or the INS. By having an FBI representative on the Undercover Operations Review Committee for each component of the Department of Justice conducting undercover operations, Section 3801(b)(6) would prevent duplicative undercover operations by two or more components, would ensure that instances in which a joint operation would be more efficient or otherwise more effective would be readily identified, and would increase the likelihood that new techniques, new safeguards, new legal opinions and other information obtained by one component would promptly be shared with and benefit other components.

Similarly, Section 3801(b)(6) would require the representative of the Office of Legal Counsel of the Department of Justice who sits on the FBI's Undercover Operations Review Committee to sit on the parallel committees for the DEA and the INS. The presence of such a legal representative should ensure that a person knowledgeable about the legal implications of proposed undercover activities will participate in the decision-making and review process and should increase the likelihood that any constitutional problem with proposed undercover activities will be identified and addressed. It seems likely that such a legal representative's expertise, assistance, and familiarity with law enforcement needs and problems peculiar to undercover operations will be maximized by his or her participation in the broadest possible variety of undercover operations.

In addition, having the same legal representative on all of the review committees will ensure that all of those committees receive similar legal advice regarding undercover operations.

SECTION 3801(c): SUBMISSION OF PROPOSED GUIDELINES TO THE JUSTICE DEPARTMENT

Section 3801(c) would require that the Attorney General submit in writing to the Senate Committee on the Judiciary and to the House Committee on the Judiciary, at least 30 days before promulgation, every guideline to be issued under Section 3801 and every amendment to, or deletion or formal interpretation of, any such guideline. This section would have the beneficial effect of enabling the Judiciary Committees to exercise their oversight responsibilities by reviewing in advance new guidelines and formal changes in existing guidelines. By using the qualifier "formal" to modify the word "interpretation," the section ensures that the Attorney General would not have to submit day-to-day decisions about the scope of existing guidelines.

The need for a provision of this sort was revealed during the Select Committee's investigation when the Select Committee discovered that the Department of Justice, without having informed the Congress, had promulgated a written interpretation of the term "public official," as it appeared in the then-existing guidelines, that was wholly inconsistent with the ordinary use and dictionary definition of that term. It seems clear that the Congress cannot effectively exercise its oversight responsibilities without knowledge of such formal, written interpretations of guidelines. It seems equally clear, however, that it would be an overreaction to conclude from that one instance that the guidelines should be codified.

SECTION 3802: AUTHORITY TO ESTABLISH UNDERCOVER OPERATIONS

This section would expressly authorize law enforcement components of the Department of Justice to engage in certain activities that are crucial to the effectiveness of many undercover operations but that are arguably prohibited by existing statutes. This authorization is advisable because of the importance of these activities to the success of undercover operations, because these activities are not themselves intrusive, and because it is unseemly for the Department of Justice itself, charged with enforcing the nation's laws, to stretch existing statutory language to its limits in order to justify engaging in those activities in the absence of a clear exemption from the statutory prohibitions.

One important limitation in the provision is Section 3802(c), which would permit a law enforcement component to use proceeds generated by a proprietary established in connection with an undercover operation *only* to offset necessary and reasonable expenses of that proprietary. This limitation would ensure that the Department of Justice could not use funds generated by an undercover operation either to expand the scope of that operation or to finance another operation.

The difficulty of monitoring and controlling the scope of undercover operations is, as Department of Justice representatives themselves have testified, inherently difficult; that difficulty should not be exacerbated by having operation-generated funds freely available to expand the scope of the operation in which they were generated or to expand the scope of other operations. If that were to be allowed, the oversight function performed by congressional appropriations committees would be made considerably more difficult. Thus, for example, it seems inadvisable to allow a law enforcement component to sell in one operation controlled substances confiscated in another operation and to use the sale proceeds to purchase contraband in yet another operation for which appropriated funds would not have been available. Similarly, in a multi-faceted operation similar to ABSCAM, it would be inadvisable to permit undercover operatives to confiscate contraband in one facet of the operation, sell the contraband to other criminals, and use the proceeds to bribe public officials.

SECTION 3803: LIMITS ON UNDERCOVER OPERATIONS

Section 3803 would impose specific statutory limitations on the initiation of undercover operations and on the offering of an opportunity or inducement to engage in a crime. This proposal strikes a desirable accommodation among several important and conflicting considerations. It establishes objective standards that must be met before the intrusive undercover technique may be used, but those standards are sufficiently flexible and non-restrictive to enable law enforcement components to enage in almost all of the undercover activities that most citizens would, on balance, find acceptable. It requires that specific findings precede the initiation of an undercover operation, but it provides that those findings should be made by individuals with substantial expertise regarding undercover operations--

namely, members of the Undercover Operations Review Committees. Through Subsection (c), it provides for an expedited procedure in exigent circumstances.

In addition, through Subsections (a)(3) and (a)(4), it requires a finding of probable cause--the same standard required for a search warrant--before an undercover operative may infiltrate any political, governmental, religious, or news media organization or pose as an attorney, physician, clergyman, or member of the news media in a manner creating a significant risk that another individual will enter into a confidential relationship with that operative. Obviously, an overriding concern for civil liberties, especially in sensitive areas such as political, religious, and news media contexts, would dictate either greater restrictions on, or an outright prohibition of, undercover activities of the type addressed in Subsection (a)(3) and (a)(4). Equally obviously, an overriding concern for effective law enforcement would reduce the probable cause requirement or leave these matters entirely to the informed discretion of law enforcement officials. Given the clear antinomy presented by these principles, Subsections (3) and (4) appear to provide a reasonable, if not the best possible, resolution. If this section should be enacted into law, and if subsequent events should reveal either that law enforcement components have frequently abused these provisions or have been unduly handicapped by them, the provisions could be amended in light of that new evidence. The lengthy investigation conducted by the Select Committee, however, provided no reason to believe that either of those undesirable results is likely to occur.

In sum, it is my opinion that S. 804 strikes an effective, delicate balance between the need for effective law enforcement and the need to protect the civil rights of all citizens. Persuasive arguments for somewhat more restrictive legislation can be made, and persuasive arguments for less restrictive legislation can be made. But no persuasive argument can be made for the current situation, in which the most effective, and the most dangerous, law enforcement technique used by the federal government is neither expressly authorized nor expressly limited by any expression of the Congress. Accordingly, I respectfully urge this Subcommittee to support the enactment of S. 804.

RESPONSE OF MALCOLM E. WHEELER TO A QUESTION SUBMITTED BY SENATOR JEREMIAH DENTON

Question. In your prepared testimony on S. 804, you mentioned that the undercover "guidelines applicable to the FBI constitute the only thorough set of guidelines governing undercover operations, even though the DEA and the INS have been conducting such operations for years, and even though the problems of management, review, and oversight and the risks to civil liberties presented by DEA and INS operations are as great as those presented by FBI operations."

In reviewing the report of the Select Committee, specifically in Appendix D of that report, I came across undercover guideline documents for both the DEA and the INS. Do you not regard the DEA and INS guidelines as "thorough guidelines," and if not, what are their shortcomings?

Answer. I do not regard the DEA and INS guidelines as "thorough guidelines" for undercover operations.

The DEA guidelines for undercover operations occupy only three pages of the Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice—namely, pages 569 through 571. In contrast, the FBI guidelines for undercover operations occupy pages 536 through 555. The difference is more than mere bulk. The FBI guidelines do, and the DEA guidelines do not, discuss, among other matters, procedures to be followed when the undercover operation could result in significant claims against the United States; procedures to be followed when the undercover operation will require leasing or contracting or property for a period extending beyond the then-current fiscal year; procedures to be followed when the undercover operation will require the leasing of facilities in the District of Columbia; procedures to be followed when the undercover operation will require the use of appropriated funds to establish or to acquire a proprietary; procedures to be followed when the undercover operation will require the deposit of appropriated funds, or of proceeds generated by the undercover operation, in banks or other financial institutions; and procedures to be followed when the undercover operation will require indemnification agreements. The DEA guidelines also do not, and the FBI guidelines do, recognize the special sensitivity of undercover operations that may intrude upon the activities of public officials, political candidates, foreign governments, religious organizations, political organizations, and news media. Further, the DEA guidelines do not provide for anything resembling the FBI's Undercover operations Review Committee, for a written application for approval of an undercover operation, for a detailed procedure to be followed in considering whether to approve an undercover operation, or for monitoring and control of undercover operations. The DEA guidelines are less thorough than the FBI guidelines in several other, but less important, respects.

The INS undercover guidelines that appear at pages 573 through 601 of the Final Report are, of course, considerably more thorough than the DEA guidelines. They do, nevertheless, suffer from most of the same problems of incompleteness that characterize the DEA guidelines as described above. In particular, they fail to distinguished adequately among the various types of undercover operations that may occur, to establish a formal application and approval procedure, to create a specific group charged with the responsibility for reviewing, approving, monitoring, and closing undercover operations, and to provide for the monitoring and control of undercover operations. In addition, my recollection is that the INS guidelines printed in the Final Report are not guidelines for the entire INS, but are informal guidelines prepared and used by the INS office in Dallas, Texas. My recollection is strengthened by the testimony of INS representative Umberto E. Moreno, who testified before the Select Committee that, at the time he testified, the INS did not have guidelines for its undercover operations and that there were "some interim position papers on the use of undercover activity." See Final Report at 346.

If I can be of further assistance, in your consideration of this vitally important bill, please do not hesitate to call on me.

Mr. NEAL. Thank you, Mr. Chairman. I would like to stay and hear the rest. I have a client out there that is in serious jeopardy and I must go back for a meeting. He may be a victim of some undercover operation.

Senator MATHIAS. Well, this committee would not want to stand in the way of justice prevailing.

Mr. NEAL. Thank you, sir.

Senator **Mathias**. Our final panel is Mr. Jerry J. Berman, the chief legislative counsel of the American Civil Liberties Union; Mr. John Seigenthaler, editorial director of USA Today; and Prof. Monroe Freedman of the Hofstra Law School.

Gentlemen, again, let me convey my personal thanks to you for your patience in sticking with us and appearing here today. We will include all of your statements in the record as if read and you can proceed to summarize them as you see fit.

STATEMENTS OF A PANEL CONSISTING OF JERRY J. BERMAN, CHIEF LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, DC; JOHN SEIGENTHALER, EDITORIAL DIRECTOR, USA TODAY, WASHINGTON, DC; AND PROF. MONROE FREEDMAN, HOFSTRA LAW SCHOOL, HEMPSTEAD, NY

Mr. **Berman**. Mr. Chairman, on behalf of the American Civil Liberties Union, I welcome the opportunity to testify on S. 804, the Undercover Operations Act of 1983, and FBI undercover operations in general.

We want to, first of all, commend you, Senator Mathias, for your leadership in bringing the civil liberties issues involved in FBI undercover operations and addressing them before the public, first in your chairmanship of the Senate select committee, and then in attempting to more forward with legislation, S. 804 to address these problems along with Senator Walter Huddleston.

Senator **Mathias**. Let me interrupt you because you mentioned Senator Huddleston, and his is a very key role in this.

Mr. **Berman**. I appreciate that, and it is your joint leadership which gives us some hope that someday we can do something about this issue.

Having testified before the select committee and issued our own report on Abscam, which we would like to make a part of the record also, if you have no objection.

Senator **Mathias**. No. We will make that a part of the record.

Mr. **Berman**. Because of our past rule, the Chairman is well aware that we believe that undercover operations are an essential law enforcement tool, particularly in the detection of sophisticated forms of consentual crimes which would otherwise go undetected.

But we also believe that undercover operations, unless conducted under strict investigative standards and tight supervision, pose significant dangers to privacy, to reputation of innocent persons caught up in these investigations and even the integrity of public institutions and the political process.

The fact of the matter today is that FBI undercover operations are not being conducted under adequate standards, controls, and supervision sufficient to protect the innocent from intrusive investigation, invasion of privacy, and injury to reputation.

Now, I think that the case for this was made by the Senate select committee report. It documented in no uncertain terms, as Mr. Neal has pointed out, that the Abscam investigation was conducted first focusing on political corruption in New Jersey and then on the Congress without a reasonable suspicion that there was political corruption going on.

Then the targetting of particular politicians was done without meeting a reasonable suspicion standard, and as a consequence, a number of innocent politicians were dragged into the Abscam net, subjected to video taping, intrusive testing of their virtue and their reputations were injured; for example, Senator Pressler, Congressman Hughes, and others.

A case for reform was made in the report. But I think that the public was so mesmerized and focused on whether or not those convicted were the subject of entrapment or prosecutorial misconduct—which the report made clear was not the case—the news story was not the investigative lapses but that Abscam was a fine investigation with respect to those who were convicted.

As a result, momentum for the reforms in the report, I think, never got underway.

Now, hopefully with the publication of the House subcommittee report by Congressman Edwards, there will be some rekindling of interest in the problems posed by the current standards under which undercover operations are being conducted.

Like Abscam, Operation Corkscrew in Cleveland again finds the FBI and the Justice Department working on an investigation of judges where there is no reasonable evidence at all of judges being involved in case fixing.

There is some evidence of bailiffs and low clerks being involved in case fixing, and so the FBI with the Justice Department supervision and approval goes forward and sets up an undercover operation targetted on the municipal judges, brings them into encounters, attempts to offer them bribes directly, and since no judges were involved, the FBI ended up scamming itself as its middleman or informant set them up with phoney judges.

Here is a prohibition which does not exist in S. 804 but which is raised by conduct since S. 804 was drafted. It has now come to light that in North Carolina where the FBI may have had a reasonable suspicion that local corruption was going on, that in order to ferret it out in Operation Calcor, they proceeded to set up and then attempt to fix a local referendum in Bolton, NC.

Such an investigation and misuse and interference with the political process is totally unacceptable. The election had to be thrown out and the board of elections in North Carolina said that the first amendment rights, and we agree, of the citizens of Bolton County were interferred with by Federal Agents in their conduct of that investigation.

Now, when we look at these cases, no matter how many cases there are on the other side where there have been no lapses or where there has been reasonable suspicion, I think a case for reform has been made.

Now, when we get to what should those reforms be, if you ask the American Civil Liberties Union, we are for a reasonable suspicion standard to initiate an investigation, a reasonable suspicion standard to target a person for a corrupt encounter, a warrant so that a judge would make an independent determination of that, and a civil damage remedy if anyone is injured as a consequence of a undercover operation.

The House subcommittee agrees with our warrant recommendation, but the problem is that in asking for too much I think we may accomplish nothing. But as you listen to the Justice Department this morning, in their withering criticism of what Mr. Neal called a modest proposal and which we do not think goes far enough, all they want is the authority to conduct undercover operations but with no limitation whatsoever.

I think that given the political climate and given the practical realities and given the need to do something about undercover operations, that a more modest agenda has to be pursued.

We have looked for where the consensus is in the Congress, both in the Senate committee and in the House committee on the other side. I think it comes down to some consensus on the following matters.

First, that a reasonable suspicion standard should apply both to the initiation of an investigation and that a strict reasonable suspicion standard should apply to the targetting of any person.

Those standards are set forth in section 3803 of your legislation.

That there is a consensus both in the Senate committee and with the majority and minority on the House committee to expand the undercover operations committee membership that reviews these operations to include outsiders.

Your committee recommended the Office of Legal Counsel. The House recommended the Civil Division and the Civil Rights Division. Fine. Three more chairs, but some interest to look at the legal ramifications, the privacy and civil liberties issues that are being involved when you initiate an investigation or target someone in those investigations.

Those have to be taken into consideration along with law enforcement interests before these investigations are launched, and if it cannot be by a judge and a court, then let us start with an upgraded review committee which is mandated to look at an application which provides articulable facts that reasonable suspicion exists both to initiate and to target persons in investigations.

With those modest reforms, I think we could move forward and take some steps in the right direction, and then next year, we can come back and we can continue to debate the warrant requirement.

We will be glad to state our reasons and our arguments for it. We can talk about an entrapment defense. We can talk about expansion or modification of the Federal Tort Claims Act. We can talk about the limitations or prohibitions on undercover operations.

But I think that if we insist on them at this point, and this may not sound like the traditional ACLU position which insists on everything, I think that we doom any reform effort.

But with undercover operations on the rise, with a new demonstration that operations do get out of control, that persons are injured, that the courts have not extended protection to such investigations and have eroded the entrapment defense and given their blessing to this conduct by FBI agents and said, "We think some of it is abhorrent but it does not violate the Constitution. If something is going to be done about it, it is up to the Congress."

So I think we are back at square one. We ought to move forward either in the authorization process, the appropriations process, separate legislation, to get these modest steps into law. Thank you.

[The prepared statement of Mr. Berman and the report on Abscam follow:]

PREPARED STATEMENT OF JERRY J. BERMAN

Mr. Chairman and Members of the Committee:

Introduction

On behalf of the American Civil Liberties Union, I welcome the opportunity to testify on S. 804, the "Undercover Operations Act of 1983" and FBI undercover operations in general. As you know the American Civil Liberties Union is a nonpartisan organization of over 275,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights.

We want to first of all commend Senator Mathias for the leadership he has demonstrated in bringing the civil liberties issues posed by undercover operations before the public, first through his chairmanship of the Senate Select Committee to Study Undercover Activities of Components of the Department of Justice. The Senate Select Committee held hearings in 1982 on Abscam and other undercover operations and issued an excellent and exhaustive report together with recommendations for reform in December of that year. The Chairman is also to be commended for crafting with Senator Walter Huddleston, the Vice-Chairman of the Select Committee, S. 804, which would enact the committee's recommendations into law.

Having testified before the Select Committee and issued our own Report on Abscam (which we would like to make a part of the record), the Chairman is well aware that while we believe undercover operations are an important law enforcement tool in detecting sophisticated forms of consensual crime which would otherwise go undetected, we also believe undercover operations, unless conducted under strict investigative standards and tight supervision, pose significant dangers to individual privacy, the reputation of innocent persons caught up in these investigations, and even the integrity of public institutions and the political process.

Inadequate Standards and Supervision

The fact of the matter is that FBI undercover operations are not being conducted under adequate standards, controls, and supervision sufficient to protect the innocent from intrusive investigation, invasion of privacy, and injury to reputation.

Although the Senate Select Committee absolved the Justice Department of improper political motive in conducting the Abscam investigation or the entrapment of members of Congress who took money in exchange for political favors, the Select Committee was highly critical, and we think properly so, of the Abscam investigation and the fact that so many innocent public officials were subjected to intrusive, videotaped encounters, where there virtue was improperly tested. The Committee recommended stricter, legislated standards and controls to avoid a repetition of the Abscam investigation. Unfortunately, the public and press, having fixed their attention on the cases in which convictions were obtained, focused only on that part of the Report which vindicated the Justice Department handling of the prosecutions of public officials who took bribes and ignored the investigative lapses and the Committee's call for reform.

Now the House Judiciary Subcommittee on Civil and Constitutional Rights has issued a Report on FBI Undercover Operations which we hope will rekindle interest in measures to control FBI undercover operations, including significant aspects of S. 804. The Report, released two weeks ago, documents a major post- Abscam undercover operation, Operation Corkscrew in Cleveland, in which innocent citizens, in this case, municipal judges, were targeted for investigation and offered ambigous inducements to engage in crime. The public revelation of this investigation, however ill-conceived, has nevertheless resulted in damaging the reputation of the targeted judges. In two other cases documented by the House Subcommittee, undercover operations have unacceptably impacted on and interfered with the workings of public institutions which must be above reproach, the judicary and the democratic process. I refer to Operation Greylord in Chicago in which FBI operatives posed as prosecutors and defense attorneys in real and phony cases and Operation Calcor in North Carolina in which undercover agents rigged a local election referendum in order to uncover local corruption.

Because we believe the House Report when read in conjunction with the Senate Select Committee Report makes a compelling case for reform, we believe it is essential to briefly review the Senate findings. As the Select Committee documented, the Justice Department and the FBI did not follow its own threshold standard for initiating an investigation which requires a reasonable suspicion "that criminal activity of a given pattern is occuring or is likely to occur..." The record shows that FBI agents and their key informant, Mel Weinberg, shifted the investigation from a sting operation to a political corruption investigation focused on New Jersey politicians and then members of Congress without documenting reliable evidence that a specific pattern of political corruption was occuring or likely to occur. This happened dispite supervision by the Justice Department Undercover Operations Review Committee. Even more troublesome, the FBI did not follow its guideline requiring that before a particular person can be offered an inducement to engage in a criminal act, the FBI and the Justice Department must have a "reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage, in illegal activity of a similar type." Instead, the Justice Department relied on an alternative method of attempting to structure the criminal opportunity so that there is "reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity." This led the FBI to allow unwitting middlemen to bring politicians to videotaped sessions where it was supposedly made clear that the transaction was corrupt. In a number of cases, unreliable middlemen misled politicians as to the nature of the meetings and brought wholly innocent politicians to videotaped sessions where their virtue was tested. Although in some cases the FBI decided not to make the offer or the politician refused, the intrusive encounters nevertheless took place and the virtue of the innocent was tested. The public revelation of these investigations, which included Senator Larry Pressler of South Dakota, Representative William Hughes of New Jersey, and Rep. Edward Patten of New Jersey, also damaged the reputation of these officials. The public has yet to appreciate that perhaps 40% of the officials targeted for investigation in Abscam were either innocent of any wrongdoing or targeted without any reasonable factual basis to believe they would engage in criminal activity and that Justice Department standards and supervision failed to prevent these unwarranted investigations from occuring.

The House Subcommittee Report underscores the inadequacy of current standards, controls, and supervision. Operation Corkscrew, an FBI undercover investigation of possible case-fixing in the Cleveland Muncipal Court, was conducted for the most part within a time frame (1978 thourgh 1982)in which the FBI and Justice Department should have been aware of the need for stricter investigative standards and supervision to avoid the errors of the Abscam investigation. But the lessons of Abscam were ignored. Although there was some evidence of case-fixing by bailiffs and other minor court officials, the Report documents in great detail how the Justice Department allowed the FBI investigation to focus on case fixing by municipal judges without any factual basis amounting to a reasonable suspicion that judges were taking bribes. Recorded encounters with judges and FBI operatives were set up at which the operatives attempted to have the judges acknowledge that they had fixed cases. The recordings of these conversations show the FBI violating its guideline rule of making the illegal nature of the encounter clear and unambiguous. When these encounters produced no incriminating evidence, the FBI tried to set up encounters in which judges would accept money directly. The Bureau's informant, unable to deliver real judges, set up meetings between the FBI and phony judges at which "bribes" were accepted. The FBI itself was "scammed." Again, innocent public officials were targeted for intrusive investigation and their virtue tested. Again, the reputations of public officials were injured by the lingering public question of why the judges were targeted in the first place (i.e. The FBI must have known something.) As in Abscam, the Justice Department's Undercover Review Committee did not require agents to present reliable factual information to establish a reasonable suspicion for targeting particular judges.

Both Operation Greylord in Chicago and Operation Calcor in North Carolina document some of the broader dangers of current FBI undercover operations. In both cases, the FBI did have a reasonable suspicion of criminal activity and did uncover corruption. However, on balance, a serious question is raised regarding the methods used to ferrit out corruption. In Operation Greylord, FBI undercover operatives posed as prosecutors and defense attorneys, often in real cases. The investigation has uncovered illegal activity but threatened the integrity of the judicial process, the due process rights of defendants, and confidential relationships between attorneys and clients.

In Operation Calcor in North Carolina, the FBI uncovered local corruption but operatives influenced citizens to conduct a local referendum to permit liquor to be served in the county and then offered inducements including a new restaurant, revenues, jobs, and cash payments in this rural county in an attempt to rig the election. In throwing out the election results, the North Carolina State Board of Elections stated that Bolton's "citizens were denied...basic First Amendment rights where thousands of dollars were secretly paid by federal undercover agents to influence the result of...(the)..referendum."

The Need for Reform

We believe that a strong case for reform of FBI undercover operations has been made, first by the Senate Select Committee and now by the Report of the House Subcommittee on Civil and Constitutional Rights. What needs to be determined is what reforms should be enacted and which are possible at the present time.

As you know the ACLU favors enactment of legislation to require the FBI to develop reliable evidence amounting to reasonable suspicion both to initiate an undercover investigation and before offering any person an opportunity to engage in illegal activity. Agreeing with the majority of the House Subcommittee on Civil and Constitutional Rights, we believe that the FBI should be required to obtain a warrant from an independent magistrate to conduct an investigation or target a person based on these standards. In addition, we believe a civil cause of action should be available to any person who suffers a violation of privacy or other damages as a consequence of an unwarranted undercover operation. The Senate Select Committee in its Report recommends the reasonable suspicion standards but proposes that the FBI demonstrate reasonable suspicion to an expanded Justice Department Undercover Operations Review Committee rather than to a court. These recommendations together with other limitations on undercover operations are set forth in S. 804.

Based on the Justice Department's strong opposition to many of the provisions of S. 804 as detailed in a Justice Department letter to the Chairman of the Senate Judiciary Committee on October 17, 1983 and the lack of broad support for a judicial warrant requirement at the present time, we are concerned that in attempting too much we may accomplish no reforms at all. That certainly is the lesson learned in the ill-fated attempts in the last Congress to enact FBI and CIA charters.

Therefore, it is our recommendation that the Congress work to develop a bill which incorporates reforms which can achieve a consensus at the present time. Either as separate legislation or as amendments to the Justice Department Authorization bill, Congress should authorize undercover operations together with certain statutory exemptions which the Department requires to conduct undercover operations. At the same time, Congress should establish that no undercover operations involving "sensitive circumstances" may be conducted except pursuant to a reasonable suspicion standard and with the approval of the Undercover Operations Review Committee expanded to include members from the Office of Legal Counsel and the Civil Rights and Civil Divisions. While the Justice Department even disagrees about expanding the membership of the Review Committee, there is bi-partisan support for this reform in the Senate and House. The Senate Select Committee recommended expansion of the Review Committee and significantly, so does both the Majority and Minority Reports of the House Subcommittee on Civil and Constitutional Rights.

The legislation would consist of Section 3801 and Section 3802 of S. 804 establishing authorities to conduct undercover operations, requiring detailed guidelines to be issued, and expanding the membership of the Justice Department Review Committee. Subsection (b)(6) of section 3801 should be amended to include members of the Civil Rights and Civil Division on the Review Committee so that privacy and civil rights interests may be weighed together with law enforcement considerations in any application to conduct an undercover operation or target a person in the course of such an operation. In addition, the legislation would include the reasonable suspicion standard set forth in section 3803 (a)(2) which is the standard the Senate and House committees both endorse and which the Justice Department letter does not contest. An amendment to this section would be necessary to require the FBI to present reliable evidence to meet this standard to the Undercover Operations Committee which would then approve or disapprove the investigation or the offering of an inducement to engage in a criminal act to any person.

Conclusion

We believe these reforms achievable and a significant step in the direction of bringing FBI undercover operations under proper control and supervision. It may even be possible to include two essential prohibitions: (1) interfering or entering into any privilged relationship in a undercover capacity; and (2) conducting an undercover operation in such a mannner as to interfere with the political or judicial process as occured in Operation Calcor, Corkscrew, and Greylord.

This does not mean that we will cease to pursue more fundamental reforms in the future: a judicial warrant requirement, an objective entrapment defense, further limitations on operations, and a civil damage remedy under the FTCA.

However, with the number of operations expanding every year, and with a record that calls out for stricter controls and supervision over these operations, we believe that a more limited agenda is necessary to begin to address a significant law enforcement tool which today poses significant dangers to civil liberties.

THE LESSONS OF ABSCAM

A Public Policy Report

by

The American Civil Liberties Union

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October 10, 1982

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Preface

The ACLU has long held the view that investigative techniques such as infiltration or undercover operations are highly intrusive and subject to enormous abuse of discretion. Therefore, such techniques require strict standards and controls in order to protect civil liberties. We have urged this view for years upon the courts and upon Congress, without success. This report is intended to generate an informed public debate, both in and outside of Congress.

We have reviewed in detail both the court records of particular Abscam cases as well as the excellent hearing record developed by two Congressional committees. This report, prepared by Jerry J. Berman of our legislative office in Washington, provides a detailed factual summary of what actually happened in Abscam -- what the FBI's own guidelines required, the extent to which those guidelines were followed, why Abscam was initiated, how particular politicians were chosen as targets, and the degree to which the entire operation was adequately supervised.

We believe the facts lead inescapably to the conclusion that new legislation is required to impose limitations on the FBI's discretion to engage in undercover operations, while continuing to permit such operations to take place under narrowly defined circumstances.

We believe in general that undercover operations should be authorized only when there exists a sufficient amount of prior evidence of a pattern of criminal activity. We also believe that before any particular individual or group becomes a target of an infiltration or undercover operation, a high standard of reliable evidence indicating involvement or likely involvement in criminal activity must be met, and that the judgment of whether such evidence is sufficient should not be made by those seeking the authorization.

If police were permitted to issue their own search warrants, Fourth Amendment standards would inevitably be eroded. It is a proven principle, based on centuries of experience, that even adequate standards will be insufficient to protect the innocent from intrusive investigative techniques unless procedures are established that locate the decision to authorize such techniques in some independent authority. Clearly there are differences between traditional searches and undercover operations, but the analytic problems posed by both techniques are very similar. Apparently persuasive arguments will be made by law enforcement officials in defense of retaining their discretion to authorize undercover operations directed at particular targets. We urge the public and Congress to resist these arguments. If the Fourth Amendment did not exist, and were here being proposed, no doubt law enforcement officials would resist the judicial warrant procedure with similar arguments. We believe our country's founders were right to resist those arguments in the 18th Century, and we believe that the lessons of Abscam and other undercover operations should lead this generation's lawmakers to resist them as well.

Ira Glasser
Executive Director

I. Introduction and Summary of Conclusions

The verdict may be in on the Abscam defendants but it is still out on the FBI's Abscam investigation. Two committees of Congress, the Senate Select Committee to Study Law Enforcement Undercover Operations chaired by Senator Charles McC. Mathias (R-MD) and the House Judiciary Subcommittee on Civil and Constitutional Rights chaired by Representative Don Edwards (D-CA), are conducting hearings on Abscam and other FBI undercover operations with a focus on the existing guidelines governing the conduct of FBI undercover operations; whether those guidelines are adequate to protect privacy and other individual liberties; and whether the guidelines should be codified in legislation.

The American Civil Liberties Union considers these inquiries of enormous importance and has prepared this detailed report to address the issues raised by Abscam and the FBI's current undercover operations guidelines. The focus of this report is on the FBI's guideline standards for initiating and conducting undercover operations and for targeting persons or groups for investigatioon in particular operations. This report does not discuss in any detail FBI rules governing entrapment which come into play after a person or group has been targeted for investigation or the entrapment defense. While it is obviously important to protect the innocent from government overreaching or undue inducements once they have become the targets of an undercover operation, the ACLU believes the principal aim of guidelines and procedures should be to establish procedures for determining who becomes the target of investigation in the first place.

To determine whether the current investigative guidelines for undercover operations are sufficient to protect civil liberties, the ACLU reviewed the conduct of the Abscam Undercover Operation with particular attention given to the investigative standards and procedures employed by the FBI. 1/ We also examined the current Attorney General Undercover Operations Guidelines. Although they were promulgated after the completion of the Abscam investigation, 2/ Justice Department and bureau officials have testified that the substantive investigative standards followed in Abscam are embodied in these guidelines. 3/

Based on our review, which included the excellent hearing record of both the Senate Select Committee and the Subcommittee on Constitutional Rights of the House Judiciary Committee (hereinafter the Edwards Committee) which also is conducting oversight hearings on FBI undercover operations, 4/ we have reached the following conclusions discussed in detail below:

> First, the FBI did not adhere to its own standards in conducting the Abscam investigation.
>
> Second, the standards, to the extent they were followed, are insufficient because they do not adequately protect the innocent from being the targets of undercover operations. Too many innocent public officials were targeted for bribes and/or brought before video cameras for bribe offers.
>
> Third, the guidelines need to be changed to require the FBI to determine that there is an ongoing pattern of criminal activity before initiating an undercover operation to mirror the illegal activity and to require that before targeting a person or group in a particular undercover operation there be sufficient and reliable evidence indicating that the person is engaged or is likely to engage in criminal conduct.
>
> Fourth, the FBI should be required to obtain independent authorization to use undercover operatives for purposes of testing a person's criminal predisposition or for covert infiltration of an

> organization. The ACLU recommends a judicial warrant requirement based on an objective standard sufficient to indicate that a person has engaged, is engaged, or is likely to engage in criminal conduct of the type under investigation.
>
> Fifth, in addition, a person who suffers invasion of privacy or injury to reputation because of an unauthorized undercover operation should be able to bring a civil damage action against the government.
>
> Finally, additional procedures and controls need to be developed to insure proper supervision over undercover operations.

The ACLU firmly believes that the substantive investigative standards and ancillary mechanisms to control intrusive undercover operations need to be enacted into law, preferably in the context of an overall investigative charter for the FBI. As we stated in our congressional testimony on the FBI Charter proposal (S. 1612) in 1979, these standards are not constitutionally required under current case law and thus it is up to the Congress to provide such additional protections for civil liberties. 5/ Guidelines, however strict, can be modified with the stroke of the executive pen or by executive reinterpretation. Legislation places the guidelines on a more firm foundation and legislative history can set forth how the substantive standards are to be interpreted. Moreover, ancillary mechanisms, such as civil remedies require legislation.

At that time, Congress neither adopted ACLU recommendations nor enacted the FBI Charter. If members of Congress today are distressed by the investigative standards employed in Abscam, they should not be surprised since those standards -- including the targeting of undercover operations against persons based on less than a finding of reasonable suspicion of criminal activity — were contained in the FBI's own charter proposal. 6/

We hope that the lessons of Abscam and other undercover operations reflected in the record of the Senate Select Committee and the Edwards' Committee finally will convince a bipartisan majority of the wisdom of enacting an FBI charter to control this and other intrusive bureau investigative techniques.

This is all the more urgent because of the FBI's expanding reliance on this intrusive technique in recent years and the promise of future increases now that the FBI has taken on drug enforcement responsibilities. As Senator Mathias stated on the first day of Senate hearings, the FBI, with a few exceptions during World War II having to do with espionage investigations, did not employ the technique until 1972. 7/ It is well known that J. Edgar Hoover disapproved of this investigative method prefering to rely on overt agents and covert informants to detect crime. 8/ However, beginning with fencing "sting " operations, the post-Hoover FBI began to use the technique. Up until 1977 there were few operations, mostly sting operations focusing on stolen property and fraud. In 1977, the FBI began to go into high gear, requesting $1 million from Justice appropriations for operations -- the first such request -- and conducted 53 operations together with 20 other local-federal operations financed with LEAA funds. 9/ Since then, the use of the technique has expanded dramatically. As Senator Mathias stated for the record:

> As contrasted with the statistics for that period, during the four-year period 1978 through 1981, the FBI approved and initiated approximately 1,200 separate and discrete undercover operations, many if

> not most of which involved multiple subjects or targets. . . So, we went from approximately 50 a year to almost 300 a year on the average. 10/

Undercover operations are not limited to public corruption. As Oliver B. Revell, Assistant Director of the Criminal Investigative Division of the FBI testified:

> Indeed, the bureau has now or has in the recent past had operations directed at terrorists, organized crime families and other structured criminal enterprises, embezzlement, theft and/or sale and distribution of technological information, automobiles, jewelry and precious metals, heavy equipment and narcotics. 11/

After setting forth the lessons learned from the ACLU's review of the record of Abscam, this report will set forth specific recommendations for controlling undercover operations and state in more detail why we believe these recommendations must be embodied in statute in order to establish meaningful substantive standards and procedural safeguards.

II. The Lessons of Abscam

While Abscam indelibly etched on the public mind the image of congressmen selling the public trust before video cameras and a solid record of convictions, there is another side of Abscam which the Senate Select Committee and the Edwards Committee have brought into focus for the first time and which the public needs to understand. It is the Abscam of Senator Pressler brought before the cameras groundlessly with no understanding of why he was there and of other politicians subjected to similar groundless intrusion, invasion of privacy, and injury to reputation. It includes three politicians offered money under such ambiguous circumstances -- one may have been set up by a middleman -- that prosecutions did not occur.

Overall it encompasses FBI authorizations to set up bribe-offer meetings with 27 public officials solely on the basis of representations from middlemen who were less than reliable and outside any effective government control. While two authorizations were cancelled, the others were not. Five public officials never came to a meeting. Twenty meetings were held but only twelve convictions resulted. To be sure, this is a 60% success rate, but it is also a 40% failure rate using a highly intrusive technique with damaging consequences. 12/ This nation has never permitted law enforcement officials to conduct searches, for example, without sufficient grounds, nor have we allowed the facts that such searches might result in some convictions to justify groundless intrusion against any innocent targets. In the area of searches, the Fourth Amendment was designed precisely to permit police adequate power to investigate crime, but to tailor the standards and procedures for authorizing such searches narrowly in order to avoid abuses of discretion that would harm the innocent. In Abscam, this kind of careful balance was not struck.

Too many innocent public officials were targeted for bribes and/or brought before the cameras. For each of the innocent, civil liberties were infringed, and reputations harmed. As Senator Rudman stated with respect to Senator Pressler:

> Senator Pressler will carry this for life. It is almost like someone who has been exposed to radiation. The doctors tell them they are all right, but every day of their life they wonder if something is eating away at them. Hardly a day has gone by since I was named to this Committee that Senator Pressler has not at some point during the day on the floor come up and said something about: I hope that maybe I can finally be cleared. And I said to him: Larry, you are clear, there is no question; you have a letter, essentially, almost, I would say, of apology from the Director of the FBI. But in his mind he was tainted. We are talking about prices. . . We are talking about a pretty heavy price. 13/

A price was paid even by those who did not attend a meeting simply by being targeted for a bribe offer. Congressman William Hughes of New Jersey who became suspicious at the last moment and did not come to a meeting where a bribe was authorized to be paid to him described that price to Director William Webster:

> You know that I feel very deeply about it, because we are talking about people, citizens. . .I think what differentiates us from a police state is the fact that we have an ordered society. We have certain basic protections for innocent people. And I ask myself the question, I am going to ask you that: What is it, Bill Hughes, that you did or you said that would really have your name interjected into the scum of an ABSCAM? Can you tell me what I did or said at any time, what meetings I might

> have gone to, what people I might have talked to, what associations I might have had? I dealt with your agency for years, I still deal with it. I know personally many of your agents, and I can't believe that they don't know my associations, my habits and other things, and I want to know, what it is that I did or said that really would make me the target of that reasonable suspicion that has been described? (emphasis supplied) 14/

In fact the FBI did not require "reasonable suspicion" to target Congressman Hughes or any other public official in the Abscam undercover operation. Moreover, the alternative "safeguards" it did employ, as well as the authorization process and monitoring of the investigation were wholly inadequate to prevent such infringements of civil liberties as was suffered by the Larry Presslers and William Hughes caught up in the Abscam undercover operation.

Since the "safeguards" that did not work are now embodied in the FBI's Undercover Operations Guidelines issued in January 1981, one year after the termination of the Abscam investigation, 15/ significant changes in bureau standards and procedures must be made to prevent future violations of civil liberties and that task cannot be left to the FBI itself. The failure of the "safeguards" during the Abscam investigation makes this clear.

1. The Inadequacy of the FBI's Guidelines

The ACLU has reviewed Abscam with a basic civil liberties concern about undercover operations in mind; namely, whether proper safeguards exist to insure that there is reliable and sufficient evidence of criminal activity before a person becomes the target of an undercover operation. A basic civil liberties principle, one articulated in the Attorney General's Guidelines on Criminal Investigations, is that "individuals and organizations should be free from law enforcement scrutiny . . . (unless there is) . . . a valid factual predicate and . . . a valid law enforcement purpose." 16/ Without proper safeguards to implement this principle, undercover operations may involve (1) targeting the innocent, resulting in invasion of privacy, (2) gathering information which may groundlessly injure reputation, (3) testing the virtue of citizens in general, (4) improper selective investigations, and (5) causing the commission of crimes which would otherwise not occur.

The Abscam undercover operation was initiated in May or June of 1978 and went through three phases. 17/ In phase I, beginning with its initiation, Abscam was a traditional "sting" operation. The FBI's New York field offices requested and obtained approval from FBI headquarters for an operation focused on the recovery of stolen securities, stolen art objects, and other related organized crime matters. FBI agents and Mel Weinberg, the bureau's informant and cooperating witness in the operation, developed the Abdul Enterprises scenario to put up cash for stolen property. 18/ At this stage, Abscam had a built in safeguard for ensuring that those targeted were involved in criminal activity, since a "sting" or fencing operation by its very nature attracts persons already engaged in crime (e.g. peddling stolen securities) and as such raises minimal civil liberties concerns.

However, sometime in the fall of 1978, the Abscam investigators shifted the focus of the operation from stolen property recovery to a principle concern with political corruption in New Jersey. 19/ This second phase was followed by a third and final phase in July 1979 through the end of the investigation in January 1980 when the focus shifted from New Jersey political corruption to political corruption in Congress with the initiation of the "Asylum scenario", the payment of money by phony sheiks to members of

Congress for using their influence to obtain asylum for the sheiks in the United States. 20/

The public corruption phases of the Abscam operation were markedly and qualitatively different from a traditional "sting" or fencing operation. The FBI did not passively wait for the suspects to come forward but actively encouraged unwitting middlemen who believed they were dealing with Arab sheiks to bring politicians to meetings for the purpose of offering them bribe opportunities. Unlike the suspects who come to a fencing operation, and who by definition are involved with criminal activity, i.e., attempting to dispose of stolen goods, the public corruption targets in Abscam were selected by the middlemen, who were operating out of self-interest and who did not know they were dealing with law enforcement agents. The targets, therefore, who came to the Abscam meetings may or may not have been predisposed to commit a crime. Unlike a fencing sting, the crimes were not completed by the very appearance of the targets but required a further act on the part of the FBI in making a bribe offer, often repeatedly, to politicians willing to accept. 21/

Unless one assumes that the FBI ought to be allowed to set up random opportunities of this kind or that a meeting of this nature is not intrusive, neither of which assumptions we can accept, then safeguards are necessary to insure that the bribe opportunities are based on as solid a "factual predicate" as any fencing sting.

The ACLU believes two substantive factual standards must be met -- one permitting an operation to be initiated and the second to target a specific individual. By analogy, if evidence of stolen securities triggers a fencing sting, then evidence of political corruption in a particular area must exist to initiate or in this case redirect an Abscam-type operation. Second, if fencing stings by definition attractthe criminally disposed, then a sufficient and reliable factual basis must exist for believing that those who are approached to come to a meeting where a bribe offer will be made are as criminally disposed.

In March of 1980, a month after Abscam became public, then Assistant Attorney General Philip Heymann testified before the Edwards Committee as to the existence of such safeguards during the Abscam investigation to protect the innocent. Mr. Heymann articulated three central safeguards:

> As a _first_ safeguard, we only initiate investigations, and we only use the undercover technique, when we reasonably suspect that criminal activity of a given type or pattern is occurring or is likely to occur. . . . We impose on ourselves the requirement that there be a well-founded suspicion of criminal activity in a sector or area before commencing an undercover operation . . . 22/
>
> Most important, however, is the _second_ major safeguard followed in every undercover operation, of making clear and unambiguous to all concerned the illegal nature of any opportunity used as a decoy. 23/
>
> A _third_ important safeguard in undercover operations is our modeling of the enterprise on the real world as closely as we can. 24/
> (emphasis supplied)

In testifying again before the Edwards Committee on June 3, 1982, Mr. Heymann reiterated the three protections -- now incorporated in paragraph "J " of the Attorney General's Undercover Operations Guidelines issued in January of 1981 -- and added a fourth safeguard:

> It was made clear to (the middlemen) that the official was not to be brought in for a meeting unless he understood that a

> thoroughly corrupt transaction . . . would be offered at the meeting. This is important because it means that a . . . (middleman) . . . who wants to preserve good relations with both Members of Congress and the organization he believes is offering the bribe, has every incentive to avoid angering both parties by bringing an innocent legislator to a corrupt meeting where the legislator would be seriously embarrassedand the briber would fear disclosure and possible prosecution. 25/

It should be noted that of the four safeguards, only two guard against an innocent person being brought to a meeting where a bribe could be offered: the first, the requirement of a "pattern of criminal activity", designed in Mr. Heymann's words, to avoid "fishing expeditions" 26/ and the fourth, the reliance on the self interest of the middlemen to bring in only the corrupt and not the innocent. 27/ If these safeguards fail, an intrusive meeting will be held, the video cameras turned on, an offer of a bribe considered. The other protections, important as they are, protect, not against the intrusion into privacy, but against the commission of a crime by the unwary. 28/ In Abscam, the protections against investigation of the innocent often failed.

2. Was There A Prior Pattern of Criminal Activity?

There were two changes in Abscam. The first involved a shift in investigative focus to political corruption in New Jersey. The second was a shift in investigative focus to the Congress. In neither case was the existing "pattern" standard met.

According to Justice Department and FBI officials, phase two of Abscam, the public corruption investigation centered on New Jersey politicians, commenced between November 1978 and January 1979. Asked by the Senate Select Committee to document the "well-founded suspicion of criminal activity" in the sector to justify commencing the public corrpution phase, officials point to the allegations by middleman Howard Rosenberg in November 1980 that New Jersey politicians, particularly Mayor Angelo Errichetti of Camden, were corrupt and would accept bribes in connection with casino deals in Atlantic City and the willingness of Mayor Errichetti to accept a bribe in January 1980. 29/ Responding to Chief Counsel James Neal of the Senate Select Committee, Francis M. Mullen, Jr., Executive Assistant Director of the FBI who headed the Criminal Undercover Operations Review Committee set up during Abscam to review all undercover operations, testified to this effect:

> Mr. Neal: All right. Is it your testimony, then, that the reasonable indication of criminal activity in a particular area -- which is one of the safeguards before you open or, I assume, totally change the direction of an operation -- came in this case with Mayor Angelo Errichetti?
>
> Mr. Mullen: Basically, that is correct. 30/

Bureau documents tend to support this basis for initiation. The first document telling FBI Headquarters that bribery of politicians had arisen as a possible avenue of investigation was sent on December 21, 1978, after the Rosenberg allegations. 31/ On January 11, 1979, the FBI's Brooklyn-Queens Field Office told FBI Headquarters that Abscam was "targeted against high level political corruptors," and requested permission to offer Mayor Errichetti a bribe. 32/ A day earlier, Errichetti had also mentioned Senator Harrison Williams as a possible corrupt politician. 33/ Errichetti accepted a bribe on January 20, 1980. 34/

However, there is evidence that Abscam operatives were seeking out corrupt politicians in New Jersey sometime before Mayor Errichetti came into the picture and before the FBI could, by its own guideline standards "reasonably suspect that criminal activity of a given type or pattern" — here political corruption — was "occurring or likely to occur." According to the Senate Select Committee, there are at least two taped conversations involving Mel Weinberg, the Bureau's informant and cooperating witness, urging businessmen and middlemen to bring in corrupt politicians as a condition of the sheiks dealing with them. According to the Senat^ Select Committee Counsel:

> (O)n September 13, 1978 . .. Weinberg told (Herman) Weiss that the sheik would not agree to allow any other person to hold an ownership interest in an Abdul Enterprises venture unless that person were a politician who had to be bribed. In addition, on October 6, 1978, in a conversation with businessman William Rosenberg and Dan Minski, Weinberg again raised the issue of corrupt politicians. On this occasion he did so expressly in the context of a discussion of gambling in Atlantic City, New Jersey, and indicated that Abdul Enterprises would provide financial support to Minski and Rosenberg in Atlantic City if they could show him that they had 'the juice.' It was Rosenberg who, on November 16, 1979, told Weinberg that Abscam defendant Angelo Errichetti, the Mayor of Camden, New Jersey, was corrupt and who then arranged for Errichetti's introduction to an undercover agent. 35/

Weinberg may have been acting on his own or, according to testimony in the Jenrette trial, on the instruction of his Florida FBI agent contact, Gunner Askeland, who told Weinberg in late October 1978 that the FBI was "no longer interested in pursuing any investigation of illegal securities and that 'the new targets were going to be . . . deals with Las Vegas and Atlantic City and politicial corruption." 36/ If the latter is true, FBI field agents turned Abscam into a political corruption investigation in New Jersey before a "pattern" of criminal activity was in evidence. Even if Weinberg was acting on his own, he was the FBI's cooperating witness and contact with middlemen and was acting under FBI control. By virtue of Weinberg's activities, the bureau at least "unofficially" allowed the Abscam investigation to shift to political corruption before significant evidence of corruption was in hand. While a "pattern" may have developed, it developed after the fact.

Finding the requisite "pattern" of criminal activity to justify Abscam's shift from New Jersey politicians to members of Congress is even more problematic. According to the Justice Department and FBI officials, Abscam shifted to a focus on Congress on or about July 26, 1979 when FBI agent Ameroso came up with the "Asylum Scenario" on the Abscam yacht, "The Left Hand", in the presence of Angelo Errichetti, Howard Criden, Joseph Silvestri and other middlemen. The phony sheiks, according to the scenario, might have to leave their country and would need help in arranging for asylum in the United States, the kind of help members of Congress and perhaps immigration officials could arrange for cash. 37/ Again, there is evidence of Weinberg initiating the shift in investigative focus, as it turns out that Weinberg came up with the Asylum Scenario on July 14, 1979 in a conversation with George Katz, one of the middlemen. Weinberg mentioned the need for asylum help. Katz replied that the sheiks would need many friends in Congress and Weinberg told him the sheiks were looking for every friend they could get. 38/ In any event, when the middlemen left the yacht on July 26, 1979 looking for members of Congress who could arrange asylum, phase three of Abscam was underway. It was this scheme that would lead in part to the indictment and conviction of Senator Williams and the convictions of Congressmen Thompson, Myers, Jenrette, Murphy, Kelly, and Lederer.

Regardless of the convictions that resulted from the operation, it is difficult to find the investigative basis for the FBI's reasonable suspicion "that criminal activity of a given type or pattern is occurring or likely to occur" — in this case, political corruption by members of Congress in general and selling immigration asylum influence in particular. The very first safeguard articulated by then Assistant Attorney General Philip Heymann in March 1980 seems not to have been invoked. At the point of shifting the focus of investigation in July 1979 to members of Congress selling immigration asylum influence, the FBI knew the following:

> -- that in October 1978, middleman John Stowe had told Weinberg that Congressman John Jenrette was "as big a crook as" Stowe but the lead had not been followed and Stowe's reliability was untested. 39/
>
> -- that Senator Harrison Williams of New Jersey had been mentioned by Angelo Errichetti in January 1980 but was being investigated in connection with possible influence peddling to benefit his "secret" interest in a titanium mine and as part of the New Jersey political corruption focus. 40/
>
> -- that in March 1979, Errichetti had named a number of state and local officials as corrupt politicians and one congressman, Michael "Ozzie" Myers. However, in targeting the local politicians, Errichetti's reliability should have been viewed as doubtful. He had brought New Jersey Casino Control Commission Vice-Chairman Kenneth MacDonald to a meeting and had picked up a briefcase of cash "for him" in such ambiguous circumstances that it appears MacDonald may have been set up. By July, Errichetti had produced a state politician at a meeting who did not know he was brought there for a corrupt transaction -- a

> violation of the FBI's explicit instructions to the middlemen to brief the politicians on the purpose of the meetings. In September 1979, a couple of months later, Errichetti would bring a "phony" immigration official to a meeting in order to scam the sheiks and their representatives. 41/

Apparently, however, the untested allegations of Stowe concerning Jenrette and the mention of Representative "Ozzie" Myers by Errichetti provided the FBI with what they regarded as reasonable suspicion of a "pattern of criminal activity" sufficient to shift the investigation to Congress.

Consider this exchange between Executive Assistant Director of the FBI Francis M. Mullen, Jr. with the Chief Counsel of the Senate Select Committee:

> Mr. Mullen: We have had the representations by Mayor Errichetti, the contact with -- Congressman Myers' statements early on. So it is a means of identifying an allegedly corrupt situation and a means of investigating that situation, developing a means of moving forward -- in other words, following the lead that developed, not a scenario to target Congress.
>
> Mr. Neal: If the FBI deliberately decided on this scenario to see where it would go, then I ask you, where is your reasonable indication of a pattern of criminality?
>
> Mr. Mullen: Well, we had the representations, as indicated earlier, from somebody who turned out to be all too accurate, Mayor Errichetti, and then after the initial bribe payoff to Representative Michael Myers, that what Errichetti said was very true ---
>
> Mr. Neal: Well, now wait a minute. That is sort of after the fact . . . 42/

Two other matters relied on by Justice Department officials to justify focusing Abscam on congressional bribery also fall far from the mark in showing "criminal activity of a given type" that is "occurring or likely to occur." Both Philip B. Heymann, Assistant Attorney General of the Criminal Division during Abscam and Irvin B. Nathan, his chosen deputy in coordinating Abscam prosecutions, have mentioned Koreagate and the 1976 Helstoski case. 43/ Koreagate, as they state, showed that members of Congress can accept bribes and get away with it since there are no witnesses to the transactions and the Helstoski case, as they point out, shows that immigration favors may be bought and a congressman escape prosecution because of inadmissability of evidence protected by the "speech and debate clause." 44/ Both matters may also argue for the value of undercover operations to detect consensual crime, but neither example can be cited as providing a "factual predicate" for on-going criminal activity except to make the safeguard all but meaningless. They are past crimes -- "before the fact" -- and if they justify present undercover operations, almost every institution is vulnerable to intrusive investigation, particularly if allegations by unreliable or untested middlemen are sufficient to make the evidence of past crime in a general area a decisive fact in proceeding with a particular unrelated investigation.

Based on the ACLU's reading of the record, we do not believe Abscam shifted its focus to political corruption in New Jersey and then to Congress on the basis of solid evidence of on-going political corruption. On the contrary, we believe Abscam's political corruption phases were initiated as "fishing expeditions" into what Francis M. Mullen, Jr. of the FBI calls "possible corrupt situation(s)". 45/ In this case, Weinberg did the fishing, first in his early approach to Weiss and Rosenberg to bring in corrupt politicians in New Jersey and then in his development of the "Asylum Scenario" to test the waters of Congress. Rather than concrete evidence as the basis for investigation, Abscam fits more neatly into the category of investigation described by Director William Webster of the FBI before the Edwards Committee in April of this year:

> What you have is a smell. You have people who talk about it and talk around it and the tendency in our investigations is to focus upon this kind of activity, rather than upon particular individuals and create a setting in which these allegations, or smell if you want to call it, either are true or not true. 46/

That is not to say that a fishing expedition can not be successful from a law enforcement point of view and Abscam had its share of successful convictions. The policy question, however, is whether, as Congressman Robert Kastenmeier put it to Director Webster, "we do not need something more than a smell" when employing the undercover operation technique. 47/ We believe the answer is clearly yes, but in part this turns on our conclusion that other safeguards failed adequately to protect the innocent.

3. How Were Particular Politicians Targeted?

The second major issue is the basis on which the FBI and Justice Department authorized the targeting of particular politicians for attendance at video-taped meetings with FBI agents for purposes of making a bribe offer. In no case did the government condition its authorization for such an intrusive encounter on the standard contained in its own guidelines which require the government to have

> a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type. 48/

Instead of following this standard, set forth in paragraph J (3)(a) of the

Attorney General's Undercover Operations Guidelines, the government employed an alternative standard set forth in paragraph J (3)(b) of the guidelines which requires the FBI to insure that

> the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity. 49/

In Abscam, the government authorized each meeting solely on the allegation of a middleman that the politician was corrupt and the ability of the middleman to bring the politician to a meeting with the phony sheiks. The stated "reason for believing" that the persons brought to the meetings were "predisposed to engage in the contemplated illegal activity" was that the middlemen were instructed by the agents to make it clear to any politician they were bringing to a meeting that they were coming for purposes of engaging in a corrupt transaction. 50/

According to government officials, the virtue of allowing middlemen, who do not know they are dealing with government agents, to select the targets is that it avoids the charge that the government selected the targets for political or other improper motive. 51/ In fact, there is no evidence that the government engaged in selective targeting of politicians. However, the danger of this approach is that it relies exclusively on concededly corrupt middlemen to protect the unwitting politician from being subjected to an invasion of privacy and possible injury to reputation.

FBI Director William Webster, testifying before the Edwards Committee a month after Abscam became public, recognized this danger and indicated that further investigative steps were taken to shield the innocent:

> We are also aware of the problems inherent in operations where our undercover Agents are investigating subjects who are influence peddlers or middlemen claiming to know others already willing to engage in criminal activity. Since these middlemen do not know they are dealing with the FBI, or that they are the subjects of investigation, it is difficult for us to monitor their activities, and, of course, they are not under our control. We must, therefore, carefully evaluate any information they provide to us as to the willingness of a third party to engage in a crime before we proceed further and assure that if such a third party does not meet with us he is aware of the criminal nature of the meeting. 52/ (emphasis supplied)

Yet there is no evidence on the record that those who conducted or supervised the investigation in the field or in Washington either solicited or required the solicitation of additional information from or about the middlemen to test the reliability of their allegations that the politicians they were bringing to meetings were corrupt or could reasonably be expected to take a bribe. That is the testimony of the agents in the field, the strike force attorneys, bureau supervisors, and Justice Department officials monitoring the investigation. According to the Deputy Counsel of the Senate Select Committee, "the information (that was available) about the middleman's background and his reliability -- none of that information ever was forwarded up to the Director for the individual middleman in question" for his consideration when he authorized the bribe meetings. 53/ Even the "indicies checks" of FBI records which were routinely ordered by the FBI when bribe authorization requests came in from the field played no part in the decision whether or not to authorize a bribe meeting no matter how exculpatory. Michael Wilson, Assistant Section Chief of the Personal and Property Crimes

Section of the FBI, who ordered the checks stated this in answer to a question put by the Chief Counsel of the Senate Select Committee:

> Mr. Neal: (T)he truth of the matter is, isn't it, that in ABSCAM at least, irrespective of what that (the indicies check) showed, you would authorize — if a corrupt middleman says that Senator A or Congressman B will take a bribe and will come to a certain meeting, you authorize?
>
> Mr. Wilson. That is correct. 54/

The Chief Counsel also observed that "in not one single case did I see anything from other sources, good or bad, about a Senator, a Congressman, a public official, et cetera." 55/ Mr. Wilson's response confirms that this was the case in most instances:

> Mr. Wilson: I do not think that is entirely true. There may have been a couple with some information like that in them, but for the most part, that information was not in there. That was verbally given to my superiors. (emphasis supplied) 56/

Whatever the "verbal" information, it made no difference. If a middleman promised to bring a politician to a meeting, the meeting was authorized to take place subject to the agents following other safeguards (e.g. a clear, realistic bribe offer) designed to protect the innocent not from investigation but from entrapment.

According to Justice Department officials, the kind of "careful evaluation" of other information suggested by Director Webster would have been inconsistent with the objective of maintaining a "neutral" "self-selection" process! They claim that in order to maintain neutrality, the government had to meet with any politician "once a representation was made by a corrupt middleman that a public official, no matter what party, no matter how prominent, was willing to come in." 57/ To probe the reliability or veracity of the middlemen's allegations, claim Justice Department officials, would put discretionary selection into the process, amounting to "reasonable suspicion" or "probable cause" standards and create the perception of political selection of targets. 58/ As Irvin Nathan argued in defense of relying on the middlemen:

> I think the worst of all possible worlds would be selection to say, 'This middleman's words we will take, this one we will not. This Congressman we will see, that Congressman we will not, to suggest there could be political selection in the process. That is what I think needs to be eliminated, and that is where I think Abscam was very successful. 59/

4. The Role of the Middleman

Instead of probing the reliability of the middlemen, the government relied on the "self interest" of the middlemen in bringing in only corrupt politicians to safeguard the innocent. Summarizing the government's rationale for this "safeguard" set forth earlier in this report:

> -- the middleman will not approach an innocent person with such a statement about an illegal transaction because of fear the innocent person will call the authorities;
>
> -- the middleman will not produce an innocent person at a corrupt face-toface meeting for fear of being subjected to embarrassment, prosecution, or retribution by those making the bribe offers; and
>
> -- the middleman will not bring in the innocent for fear of jeopardizing his continuing lucrative relationship with the criminals he is bringing the politicians to meet. 60/

Yet on a number of occasions the middlemen did bring politicians to meetings who were not told the purpose of the meeting, told that the meeting was for lawful purposes, or instructed in such ambiguous fashion that the FBI agents did not know whether or not they understood the illegal purpose of the meeting.

Angelo Errichetti, a key middleman relied on by the FBI in Abscam, violated the "self interest" rule on several occasions: 61/

> -- In March 1979, he brought New Jersey Casino Control Commission ViceChairman Kenneth MacDonald to a meeting and picked up a briefcase of cash for him in such ambiguous circumstances that it appears MacDonald may have been set up. Errichetti pocketed the bribe. 62/
>
> -- In June of 1979, according to a report of the Senate Select Committee, "Errichetti arranged a bribe meeting between the sheiks' representatives and a New Jersey public official. Before the meeting, Errichetti told Weinberg that the public official would accept a bribe and would guarantee a license for check-cashing privileges in specified New Jersey cities. At the meeting, it became clear that the official would not, and probably could not, make such a guarantee; and Errichetti then admitted that he had not in fact discussed the matter with the official before the meeting." 63/
>
> -- In September 1979, again according to the findings of the Senate Select Committee Counsel report, "Errichetti arranged a bribe meeting between the sheiks' representatives and a high-ranking immigration official. When the "official" appeared, however, he was not an official at all, but one of Howard Criden's law partners. This event shows that both Criden (another middleman) and Errichetti were undeterred by any fear of retribution by the sheiks' representatives." 64/

Joseph Silvestri, another key middleman relied on by the FBI in Abscam, proved almost wholly unreliable in following the "self-interest" rule.

> -- The FBI claims Silvestri was reliable because he produced representative Frank Thompson. But documents show that the FBI at the time believed Howard Criden produced Thompson and that Silvestri was unaware of the illegal nature of Criden's plan when he introduced Thompson to Criden. 65/
>
> -- On October 9, 1979, Silvestri represented that for $25,000 a certain State official would accept a bribe and would sell his office. At the meeting the state official accepted the money but then promptly "sent a letter thanking Mr. Silvestri for the legal retainer in connection with the financing of a hotel . . . " The individual has not been prosecuted. 66/
>
> -- On October 19, 1979, Silvestri said he would bring in one of three Congressmen. On October 20th, one of the Congressmen showed but no bribe was offered to the Congressman because "the FBI agents were too unsure of whether the congressman knew why he was there to offer the bribe." 67/
>
> -- On November 7th, 1979 Silvestri was supposed to produce a congressman who would sell his office. The congressman has stated that he was told of legitimate investments in his district but became suspicious and cancelled the meeting. 68/
>
> -- Instead, on November 7th, 1979, Silvestri produced Senator Pressler who, of course, did not know the purpose of the meeting, having been told that some people were interested in advancing his political career. He had never met Silvestri until shortly before the meeting on that day. 69/

Despite Silvestri's record of unreliability, the FBI authorized the bribe meeting with Senator Pressler within one hour of Silvestri's call that he was bringing the Senator in for a meeting. 70/ Moreover, even after the Pressler incident, the FBI, employing the "neutral" principle of self-selection opened an investigation into one of the "most influential, highest-ranking Congressmen and was pursuing it right up to the very end of the Abscam operation on February 2, 1980." 71/

In our view the safeguard of relying on the "self-interest" of the middlemen to produce the corrupt and not the innocent was destined to fail as it so often did. In fact, the "self-interest" of the middlemen was to misrepresent the facts to both the phony sheiks' representatives and the politicians if they could possibly get away with it. The way Abscam operated permitted them to do so.

First, the middlemen were only benefited if they could produce a politician who would take a bribe so there was an incentive to risk bringing in as many politicians as possible in the hopes of increasing their take. 72/ One middleman, Howard Criden, had an added incentive since he was paid even if the politicians he produced did not take a bribe. 73/

Second, contrary to Justice Department claims, a middleman will approach innocent persons without telling them the corrupt nature of the meeting if he in fact fears they might go to the authorities. If the politician attends the meeting and turns down a corrupt offer with a threat to go to the authorities, the middleman can later "plausibly deny" having known the real purpose of the meeting. He can tell the politician, as Silvestri told Senator Pressler, that "they told me it was for a campaign contribution", 74/ and it is his word against the sheiks as to his involvement in a conspiracy to violate the law. If the politician turns down the offer but does not go to the authorities, he can tell the sheiks that the politician "must have got cold feet." If the politician accepts the bribe, the middleman is home free.

Third, as the Senate Select Committee Counsel has pointed out, the middleman

> knew the slickly garrulous and street-wise nature of Melvin Weinberg. They therefore had to surmise that Weinberg and Amoroso would not be so foolish or naive as to make an unequivocal bribe offer without first softening up and feeling out the person to be bribed; that is, the middlemen knew it was in Weinberg's interest not to act in a manner that might lead an innocent person to report a bribe offer. 75/

Fourth, the middlemen only risked "embarrassment" or the loss of a continuing lucrative relationship if they had one with the phony sheiks. Some of the middlemen had no relationship with Abdul Enterprises when they produced a politician (e.g. William Eden, William Rosenberg) and others produced only one public official:

> middlemen Ciuzio and Weiss produced only one public official (Representative Kelly); middleman Stowe produced only one public official (Representative Jenrette); middleman Katz, Sandy Williams, and Feinberg produced only one public official (Senator Williams); and none of these middlemen had previously received any money from Abdul Enterprises or engaged in criminal activity for or with Abdul Enterprises. 76/

Finally, the middleman's fear of "angering" the sheiks' representatives to the point of "retribution" may give them pause but only if the middleman are warned in advance that they risk retribution and are punished when they produce politicians who do not take bribes. But, as the Senate Select Committee Counsel report makes clear:

> The documents do not reflect that either

> of these necessary predicates existed in Abscam. The documents reflect only one instance in which Weinberg expressly told a middleman not to bring in public officials unless the middleman was sure that the officials would accept bribes. The documents reflect no instance in which Weinberg even suggested to any middleman that serious consequences would follow the middleman's failure to produce only public officials who would accept bribes. Most important, in the three instances in which middlemen stated that they knew that specified public officials would accept bribes, produced those officials at bribe meetings, and then admitted that the prior statements had been lies, neither Weinberg nor the undercover agents terminated the relationship or threatened the middlemen. In only one of those instances did Weinberg even criticize the middleman. 77/

5. Safeguards Against Entrapment

Because the safeguards against intrusive investigation and improper targeting of individuals failed in many cases, the Abscam undercover operation principally relied on two other safeguards to protect the innocent. Those safeguards, set forth in paragraph J (2) (a) and (c) of the Attorney General's Undercover Operations Guidelines required making "the corrupt nature of the activity . . . reasonably clear to potential subjects and offering illegal inducements "not unjustifiable in view of the character of the illegal transaction in which . . . individual(s) . . . (are) invited to engage." 78/ However, as we have already pointed out, these safeguards are designed to protect the innocent from entrapment but come too late to protect them from being targeted for intrusive investigation and invasion of privacy.

While the ACLU has no quarrel with these safeguards as such, and believe they should be scrupulously adhered to in any future undercover operation -- since there are instances where they were not in Abscam [*] -- we believe they are inadequate standing alone to prevent possible entrapment. Because the law of entrapment today hinges on a subjective judgment of the target's predisposition to commit a crime, rather than on the objective conduct of the government in creating crime opportunities, 79/ the "clarity" of an illegal inducement or its "realism" do not guarantee against entrapment in particular cases. At the corrupt meetings, FBI agents offered cash, sometimes repeatedly, and required the politician to take it. But a repeated offer of cash may cause one innocent person to say "No" and push another over the brink into the commission of a crime. It depends on each individual and the particular circumstances. Thus rather than relying more heavily on these safeguards -- for example the suggestion that cash should have been offered to Senator Pressler so he could say "No" and clear his name 80/ -- we believe the focus should be on tightening the investigative guideline standards and authorization procedures to better insure that those who are offered illegal inducements are already predisposed to crime. The tighter the standards the more the inducement becomes a confirmation of criminality rather than a testing of virtue.

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[*] For example, Director Webster instructed that money be paid directly to representative Thompson but Agent Amaroso instead gave the money to a middleman. Commissioner MacDonald appeared not to know the money paid to Errichetti was meant for him. One politician took the money and thanked Silvestri for his "legal retainer." Senator Williams was told to play act by Mel Weinberg at one meeting. Unlike other representatives who were offered thousands of dollars, Williams was offered benefits in the millions of dollars.

6. The Failure of FBI Management and Supervision

We believe that higher standards for initiating undercover operations and for targeting specific persons or groups are required. But, as inadequate as the current standards are, they were weakened still further by poor supervision and monitoring.

While Abscam may have been the most supervised and monitored of any FBI undercover operation to date, a claim made time and again by FBI and Justice Department officials, 81/ the oversight of Abscam still leaves much to be desired. In part inadequate monitoring of Abscam contributed to the failure of the existing safeguards to protect the innocent from intrusive investigation. Briefly,

> — both public corruption phases of Abscam were underway at the field level without Justice Department review or approval of the nature, scope, or justification for the operation; 82/
>
> -- the Justice Department did not review the FBI's "suitability" determination concerning the use of Mel Weinberg as the FBI's key informant and cooperating witness. Weinberg had previously been terminated as a Bureau informant for running a scam on the side; 83/
>
> -- FBI agents in the field did not properly control Weinberg, either to prevent him from engaging in unauthorized illegal activity during Abscam (sharing in bribes, accepting gifts, coaching Senator Williams) or to insure that his contacts with middlemen were proper. He was not required to record all conversations. His phone calls were not monitored. FBI agents did not prepare FD-302s memorializing all known conversations between Weinberg and middlemen. 84/
>
> -- there was no contemporaneous review by FBI, strike force, or Justice Department

officials of the developing record to insure that standards and safeguards were being followed. 85/

-- agents in the field and strike force attorneys supervising Abscam professed little knowledge about FBI or Justice Department guidelines governing informants or undercover agents -- particularly the strike force attorneys who claimed that the law of entrapment rather than the guidelines were of paramount importance; 86/

-- there was no one either at the field level, at FBI headquarters or in the Justice Department particularly assigned to monitor Abscam in terms of enforcing the safeguards; 87/

-- the requests for authorization to offer bribes passed through several levels of officials in the field and at FBI Headquarters but were signed off proforma provided a middleman said he could bring a politician to a meeting. The information did not include a specific record of the reliability of the middlemen involved, or any record of independent evidence they adduced. 88/

It is not difficult to see how these shortcomings in authorizing, monitoring, and supervising Abscam contributed to undermining the safeguards. For example, if Weinberg's tape recordings were being reviewed by field level or FBI and Justice Department personnel concerned with enforcing the safeguards, the government would have known that Abscam was shifting to a focus on political corruption in September 1979 rather than December 1979 and may have questioned whether a "pattern" of criminal activity had been established to justify the political corruption operation. A high level review could have been conducted to weigh the risks and benefits and plan for minimizing intrusions into privacy. A similar review could have occurred before Abscam shifted to Congress in late July. More concrete information concerning "ongoing criminal activity" might have been requested before FBI Headquarters allowed the investigation to go forward at both times.

If Weinberg's "suitability" determination had been reviewed by the Justice Department, more controls might have been placed on him. If all his conversations with middlemen had been taped or memorialized in FD-302s,[*] the Director of the FBI and the Justice Department would have known how much reliable information was provided by Errichetti about corrupt politicians in New Jersey and Congress at the 4 1/2 hour unrecorded meeting in late March when Errichetti provided his "list" to Weinberg. 89/ If all of Weinberg's conversations with middlemen had been taped, the FBI Director might have learned that in some cases the middlemen did not promise that when particular congressmen came to a meeting they were prepared to take bribes. 90/ Some authorization requests might have been rejected or postponed pending further verification.

Similarly, if field and FBI Headquarter personnel were supervising Abscam from a "safeguard" or guideline perspective and supplying information to the Director, the Director of the FBI might have had a record of Silvestri's unreliability before him when the request to target Senator Pressler came in from the field. The Director might have cancelled the meeting and asked for more information.

Many of these managment problems have been acknowledged by Justice Department and FBI officials in testimony before the Edwards and Senate Select

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[*] Bureau procedures require all investigative meetings, conversations and contacts to be reduced to memorandum, known as form FD-302.

Committee. 91/ In fact, the Undercover Operations Guidelines issued in January 1980 significantly upgrade the procedures for initiating, monitoring, and extending undercover operations with safeguarding privacy and civil liberties in mind. 92/ However, as will be pointed out in detail below, the ACLU does not think the current Undercover Operations Guidelines solve all of the significant managment problems associated with ensuring the implementation of civil liberties safeguards or that civil liberties can be adequately safeguarded merely by improving management mechanisms. Rather, we believe the record demonstrates the need for stricter substantive standards and external authorization and review. We therefore believe the first priority is to set forth the standards we would recommend for undercover operations as well as adequate procedural mechanisms to insure that those standards are met, and the need to embody both in statute rather than executive guidelines.

III. Recommendations for Reform

As Congressman William Hughes, an innocent person targeted in Abscam, emphasizes: "What differentiates us from a police state is that we have . . . certain protections for innocent people." 93/ One of those basic protections is the right of law abiding citizens to be free from intrusive surveillance and invasion of privacy by government investigative agencies.

Undercover operations involve significant intrusions into privacy and other basic civil liberties. Abscam exposed citizens to pretext interviews, deception, audio and video recording of conversations and meetings, and the FBI's testing of persons' disposition to commit crimes. 94/

In other cases, undercover operations may involve infiltration of organizations, surveillance, and information gathering. Current Undercover Operations Guidelines define an undercover operation to include not only the creation of opportunities to commit crimes but "any investigative operation in which an undercover employee is used." 95/ They permit the Director to authorize undercover operations which allow agents to pose as members of the clergy, lawyers, doctors, and newsmedia personnel in circumstances which may involve the intentional collection of privileged information. 96/ In the hands of an errant FBI, and recent history should not be ignored, undercover operations may involve surveillance of lawful political activity and the gathering of information which may be used for purposes of blackmail. It was only a few years ago that Congress discovered and deplored J. Edgar Hoover's compilation of "personal and confidential" files for just such purposes. 97/

Former Attorney General Benjamin Civiletti, in drafting undercover operations guidelines, recognized the intrusiveness of the technique. The Guidelines require the Undercover Operations Review Committee to consider, among other factors, the possible "harm to reputation", the "harm to privileged or confidential relationships", and the "risk of invasion of privacy" involved in any operation before it is initiated, extended, or renewed. 98/ Unless properly controlled, undercover operations may interfere with constitutional rights protected by the First, Fourth, Fifth, Sixth, and Ninth Amendments.

1. Why Legislation is Necessary

If rights are to be protected in regulating the government's use of the undercover operations investigative technique, legislation is necessary. Undercover operations are another case where the public's view of what the Bill of Rights should protect is at odds with what the Supreme Court believes the Constitution requires. However troubling the investigative conduct in Abscam, the Supreme Court, in the *Hampton* 99/ and *Russell* 100/ cases, give the government wide latitude to use undercover operatives and to create opportunities for crimes without running afoul of the Constitution. 101/

Similarly, while we believe undercover operatives and informant infiltrators are as intrusive as wiretaps and bugs which require a judicial warrant under the Fourth Amendment, the Supreme Court does not, holding that citizens do not have a "reasonable expectation of privacy" that their confederates are not police operatives or informants. 102/ Nor is there a case holding that even a "reasonable suspicion" standard must be met before a general investigation can be conducted. 103/ Faced with similar situations, Congress in recent years has on several occasions legislated protections for citizens rights which go beyond current Constitutional requirements. For example, Congress established a judicial warrant requirement for "national security" wiretaps, 104/ created a right of privacy in bank records, 105/ and protected news organizations from searches for evidence of crime by third parties. 106/ Congress should follow these precedents in enacting legislation to govern undercover operations.

While Congress can recommend changes in the Attorney General's Criminal Investigations and Undercover Operations Guidelines, guideline changes by themselves -- particularly with respect to basic investigative standards and controls -- are illusory reforms for a number of reasons. First, guidelines can be changed with the "stroke of a pen," and without public hearings or debate. A case in point is the Attorney General's Domestic Security Guidelines issued in 1976 to restrict domestic intelligence investigations following extensive congressional investigations into massive surveillance of lawful political activity by the FBI over several decades. In the near future, the FBI plans to issue "new" Domestic Security Guidelines which may loosen some of the restrictions. 107/ With memories of the record of past abuses fading and because of the turnover in Congress, the Bureau may not encounter much opposition to the changes.

Second, and equally important, the controlling interpretation of executive guidelines remains with the executive branch exclusively. A guideline standard which may appear strict to those outside the executive branch may not be strict at all because of internal administrative interpretation. 108/ For example, the "pattern of criminal activity" standard in Abscam appears strict but turned out to require only the allegations of an unreliable middleman, together with the past record of Koreagate, to justify finding a pattern of on-going criminal activity in Congress. Congressional oversight can play some role in determining the meaning of guidelines, but without a common consensus as to their meaning, oversight of guideline enforcement is nearly impossible. 109/

Legislating basic standards and controls, on the other hand, locks the guidelines in place. It provides the executive branch and the Congress the opportunity to develop a legislative history to explain the meaning and application of the standards -- a consensus of meaning that can be used for purposes of oversight. It provides a record and a benchmark against which to consider future changes in the standards and by requiring those changes to go through the legislative process, permits the Congress and the public to debate recommendations and influence the outcome. Finally, it permits the establishment of external controls (e.g. a judicial warrant or civil remedies) to enforce the standards.

In advocating the need for legislation, we want to make it clear that we are not suggesting that all of the guidelines and procedures governing investigations or undercover operations be enacted into statute but only basic standards, restrictions, and controls. The management and control of operations or investigations should be left to guidelines, with the Congress suggesting broad requirements it would like to see met (i.e. frequent review of operations, Justice Department supervision, and so forth).

Essentially we are proposing that Congress again consider the idea of an FBI Charter to authorize, regulate and limit FBI investigative activities. One version of the Charter was drafted a few years ago by the FBI, and introduced by Senators Edward Kennedy and Strom Thurmond in the 96th Congress. (S. 1612) The standards set forth in that proposed Charter were insufficient, but the idea of a Charter was correct. We need a law that would give the FBI the authority it needs to conduct investigations -- including undercover operations -- as well as substantive investigative standards and authorization procedures to protect civil liberties. 110/ Alternatively, Congress could take up only those provisions of the charter dealing with undercover operations and enact them after careful deliberation, proceeding to a full FBI Charter over time. In either event, legislation is necessary and the standards and controls we believe should govern undercover operations are set forth and discussed below.

2. When Should the FBI be Authorized to Initiate an Undercover Operation?

We recommend that the FBI should only be able to initiate an undercover operation under the procedures of the Attorney General's Undercover Operations Guidelines if it meets the "full investigation" standards set forth in the Attorney General's Criminal Investigation and Domestic Security Guidelines. Under the criminal investigative guidelines, a general crimes investigation may not be initiated unless

> facts or circumstances reasonably indicate that a federal crime has been, is being, or will be committed. 111/

Similar standards exist for organized crime and domestic security investigations. 112/ To meet the standard in those undercover operations which involve the "Creation of Opportunities for Illegal Activity" under paragraph J of the Undercover Operation Guidelines, the FBI would be permitted to initiate such an operation only if

> facts or circumstances reasonably indicate that the operation will detect criminal activity of a type or pattern that is occuring or likely to occur in the absense of an undercover operation.

Although Justice Department officials have testified that this standard is essentially embodied in Paragraph J (2)(b)'s requirement that the FBI have "a reasonable indication that the undercover operation will reveal illegal activities", 113/ we believe our reformulation more clearly indicates that such operations must be predicated on reliable factual information that criminal activity of a given type or in a particular section is occuring or likely to occur and that the operation is designed to provide an additional opportunity to engage in that criminal activity. 114/

These changes are significant. While the FBI conducts investigations, it also conducts "inquiries" which may be based merely on "information or an allegation not warranting full investigation." 115/ Except for Domestic Security investigations which, under the Undercover Operations Guidelines, require the FBI to meet the "full investigation" standard, 116/ FBI guidelines currently permit undercover operations at the "inquiry" stage provided high level authorization is obtained. 117/ To the extent that Abscam was initiated on the basis of allegations or information of dubious reliability, of which there is considerable evidence, the FBI was acting fully consistent with its current guidelines and could do so in the future without a change in the standards governing undercover operations. 118/

The "full investigation" standard should apply in all undercover operations. The distinction made in the guidelines between domestic security and other undercover operations such as Abscam makes no logical sense. Both involve the use of an intrusive technique in sensitive circumstances and should be initiated only on the basis of "specific and articulable facts" sufficient to indicate that criminal activity or a pattern of criminal activity is occuring or likely to occur.

Essentially, Congress would require the FBI to develop and document reliable and sufficient information and allegations to justify its initiation of an undercover operation. 119/ This should be set forth in a single written memorandum which lays out all of the relevant information as required under paragraph C (1) and paragraph E (1) of the current guidelines. In all likelihood, the FBI would have been able to meet this standard to justify phase two of Abscam focused on political corruption in New Jersey. The difference is that the FBI would have needed to supply a reliable and sufficient factual predicate for the shift in the investigation before politicians were approached. For example, before Mel Weinberg was permitted to approach Rosenberg about bringing in corrupt politicians, the FBI would have had to satisfy itself that Weinberg, the key informant, had personal knowledge about corrupt political figures in New Jersey. In all probability, he did. Similarly, Rosenberg could have been queried as to his "personal knowledge" about Errichetti's corruptability and reliability. The FBI, required to meet the full investigation standard, might have pressed Errichetti earlier for his "list" (in December rather than March), and recorded the crucial 4 1/2 hour meeting in March where he named corrupt politicians to bolster its request for focusing the investigation on "high level political corruptors." Weinberg or the agents would have queried Errichetti as to his reasons for placing persons on that list and his personal knowledge of their corruptability (i.e. prior dealings, etc). FBI Headquarters, in reviewing the request for authorization, would have been concerned with the evidence of a pattern developed by field agents and all evidence pertaining both to the reliability or unreliability of its cooperating source, Weinberg, and the middlemen the agents were dealing with to develop the case.

Justice Department and FBI officials argue that this kind of probing may have blown the cover on Abscam -- the middlemen would have become suspicious they were dealing with police agents. 120/ But Weinberg was a cooperating source of information. Moreover, questioning the middlemen was perfectly consistent with cover. The FBI agents, acting as the phony sheiks' representatives, also had a legitimate worry of being exposed to the authorities. They had a right to question Rosenberg and Errichetti as to their personal knowledge about corrupt politicians because if they were puffing, the politicians brought to the meetings might go to the authorities. They had no basis for trusting the middlemen and the middlemen had no basis for thinking they did. The questioning would have appeared quite consistent with the sheik's representatives' criminal intentions and professional sense of caution. 121/

If the "full investigation" standard were in force, the FBI would have encountered more difficulty in justifying phase three of Abscam focused on Congress. At the time phase three was initiated, Errichetti had named representative Michael "Ozzie" Myers as corrupt but Errichetti had also proved unreliable. 122/ Myers was not named in connection with immigration favors and the FBI had no evidence of on-going bribe taking by members of Congress in connection with such favors. 123/ The Helstoski case occured in 1976 124/ and Congress had since changed the rules so that the introduction of a private immigration bill could no longer by itself stay extradition. 125/ Koreagate in no way could be relied on as evidence of "on going" criminal activity and legislative history should make this clear. On the other hand, Errichetti's 4 1/2 hour conversation in late March might have provided reliable information of political corruption in Congress. Similarly, the careful probing of the middlemen brought together to discuss the "Asylum Scenario" in late July 1979 may have yielded reliable information or allegations concerning members of Congress.

In any case, a sufficient threshhold of reliable evidence must be established to initiate undercover operations. Otherwise, fishing expeditions will occur and the FBI will be free to target citizens on the basis of unsupported allegations often of dubious reliability. In testimony, Irvin Nathan suggested that an undercover offer to sell drugs to a high government official would be a good way to prove or disprove an allegation of drug taking in investigating whether to invoke the Special Prosecutor statute. 126/ Only a full investigation standard can bar such overbroad and "chilling" uses of the undercover technique. Consider Nathan's proposal in the context of the recent allegations by a former congressional page that representatives engaged in sex and bought drugs from some of the pages. Nathan apparently would permit the FBI to attempt to sell drugs to representativec, without requiring the FBI to determine the reliability of the person making the allegations. As it turns out, the former page was lying. Under a full investigation standard, the former page would be thoroughly investigated and found out without directing an undercover operation at members of Congress. In fact, the FBI proceeded in just this way. But only a change in the standards can insure that the FBI will always lay a proper foundation before even considering the use of intrusive undercover techniques. Even if some corrupt politicians or citizens escape detection, it is a price worth paying to prevent sweeping and dangerous government intrusions into privacy based on mere allegations of criminal activity.

3. What Procedures for Authorization?

For the full investigation standard to be effectively followed, the Undercover Operations Review Committee (UORC) must conduct a full scale review of the basis for initiating, modifying, extending, or renewing undercover operations to insure that the standard has been met. Current guidelines are inadequate in this respect and could permit another Abscam to occur without prior review and authorization based on the full investigation standard.

Under the current Attorney General's Undercover Operations Guidelines, operations are divided into those which may be approved by a Special Agent in Charge (SAC) at the field level 127/ and those which involve major expenditures of funds, long periods of time (more than six months), 128/ or a number of "sensitive circumstances" such as criminal activity by public officials, political groups (Domestic Security), or which involve substantial risks of violence or intrusions into privacy or confidential relationships. 129/ If an operation, initially approved by a SAC, comes to involve large finances or "sensitive circumstances", the guidelines require the UORC to be notified and a new or amended application to be processed. However, the guidelines do not require the operation to be suspended pending approval of the modification. Under paragraph M, the UORC has the discretion to allow the operation to continue or to "modify, suspend, or terminate the operation" pending review of the new application or amended application. 130/

As we interpret the guidelines, Abscam could occur again without a full scale review of the basis for its shift from a fencing "sting" into an operation focused on political corruption. Arguably, the first "sting" phase could be approved by a SAC since it did not appear to involve the requisite finances or sensitive circumstances. 131/ When the agents began to probe political corruption, the UORC would have to be notified but could decide to permit the operation to go forward before approving the modification under paragraph M. 132/ Thus, while the application for modification was being processed, Mel Weinberg could have made a number of contacts with middlemen without FBI Headquarters being aware that the agents may not have had reliable information to establish a pattern of criminal activity. The same could have happened before the FBI UORC understood the basis for targeting members of Congress.

The only way to insure that the full investigation standards are met is to require that all undercover operations require a review and authorization by the Undercover Operations Review Committee. Moreover, the guidelines should require the UORC to approve any significant modification in the operation before permitting the operation to move forward. 133/ The guidelines permit the FBI to take necessary or emergency action pending high level approval and authorization in a number of circumstances. This should suffice, pending the UORC's review and approval of any modification or extension of an operation based on full investigation standards being satisfied.

4. Standards for Targeting Particular Individuals

Once an undercover operation is underway, we believe that persons should be targeted only when there is sufficient and reliable evidence that they are engaged or likely to engage in criminal activity of the type under investigation. While a fencing "sting" by definition draws in personsengaged in criminal activity, undercover operations involving infiltration or the creation of opportunities for illegal activity under paragraph J of the

Undercover Operations Guidelines, may or may not. In these situations, we believe the FBI, before targeting any particular person or group, should be required to show that

> there is reliable information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type absent the undercover operation.

While the Undercover Operations Guidelines include a similar basis for targeting persons, 134/ the guidelines explicitly state that "inducements may be offered to an individual even though there is no reasonable indication that (a particular) individual has engaged, or is engaging, in the illegal activity that is properly under investigation" 135/ and authorize the FBI to offer inducements on other bases. As in Abscam, the FBI may try to structure the opportunity in such a way as to give the bureau reason to believe that the person drawn to it is predisposed to commit a crime 136/ or even proceed on the basis of the FBI Director's authorization alone. 137/

As we have pointed out, the Abscam requirement that the middlemen inform the politician that the meeting he was coming to was for corrupt purposes failed to protect the innocent from targeting in a significant number of cases. Other safeguards only protected against entrapment. We believe that requiring the FBI to meet a factual evidentiary standard would offer such protection without unduly interfering with legitimate investigations.

Instead of targeting politicians merely on the allegations of middlemen, the FBI would be required to show that particular persons on the basis of reliable information or allegations if offered opportunities to commit crime are likely to engage in corrupt transactions. 138/ In Abscam, the FBI would have probed Mel Weinberg as to his knowledge of the middlemen and their reliability. Agents would have questioned the middlemen about the persons they were bringing to the meetings or said they could produce at meetings. Did the middlemen know the politicians in question? Had they dealt with them before? Could this be verified by the middlemen or could the FBI determine this by independent investigation and checks of other informants and sources? 139/ The agents could have made it clear to all middlemen that if they did not prove reliable they were "out of business" and subject to "retribution." 140/ If a middleman developed a reliable "track record", his word would be entitled to great weight. Information as to a middleman's unreliability, as in the case of Silvestri and Errichetti in particular, would weigh heavily against authorizing a bribe offer on the ability to bring someone to a meeting. No meeting would have been authorized unless the FBI listened to a tape between Weinberg and the middleman stating that he was bringing a corrupt politician to a meeting and what that politician had been told about the meeting and how he had indicated he would deal with the sheik's representatives. All other information about the congressmen, particularly exculpatory matter, would be made a part of the authorization request documents.

Following this procedure, the FBI would have learned that Silvestri did not know Senator Pressler and that meeting would not have been authorized. Commissioner Kenneth MacDonald may never have been set up by Errichetti. An investigation of a high ranking member of the House may not have been authorized. Congressman Hughes might have avoided involvement in the "scum" of Abscam as he put it.

The Justice Department and the FBI oppose the notion of probing the middlemen on two grounds, neither of which are persuasive. First, officials worry about blowing the "cover" of the investigation by making the middlemen suspicious. 141/ But as we have already pointed out, the phony sheiks' representatives had good reason to question the middlemen's reliability — the fear that if the middlemen brought in politicians who were innocent, the politicians would report the sheiks and their representatives to the authorities. 142/ Certainly there was no risk in probing the reliability of Weinberg, the Bureau's informant.

The second concern is that an objective standard would require the FBI to exercise discretion in the selection of targets and therefore create the perception of political motive. 143/ Certainly, selection or discretion would be exercised under our recommended standard but the criteria for selection, if spelled out in regulations, would be demonstrably related to legitimate law enforcement, investigative purposes. If applied evenhandedly in all cases, there would have been no basis for the charge of "political" selectivity. 144/ Moreover, relying on the middlemen alone to select targets is not only a weak safeguard but no guarantee against the FBI being caught up in political or other improper selection. The bureau, in some future case, may work with an informant who has a political grudge to settle rather than a scam to run and middlemen with similar motives. Probing the reliability of informants and middlemen can avoid this situation as well as establish the "factual predicate" that justifies law enforcement intrusion in particular cases.

5. Enforcing Standards: A Judicial Warrant Requirement

The most neutral and effective way to enforce standards in undercover operations to protect the innocent is to require a neutral magistrate to issue a warrant before the undercover operation technique can be directed at any person or group for purposes of infiltration or to test criminal predisposition. As the Supreme Court said in Keith :

> Those charged with (the) investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing these tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. 145/

James Q. Wilson has recommended the statutory establishment of a warrant requirement for using undercover operations to target members of Congress to protect the principle of separation of powers. 146/ In testifying on the proposed FBI Charter, the ACLU recommended the establishment of a judicial warrant for infiltration by undercover agents and informants in domestic security investigations on the basis of the need to protect privacy of lawful political association guaranteed by the First and Fourth Amendments. 147/ Neither recommendation goes far enough. The basic right that need protection is that of all law abiding citizens to be free of intrusive surveillance by government agents and this requires a warrant of general application to all intrusive undercover operations.

While we believe an informant infiltration may be more intrusive than a wiretap since he or she acts as a "walking, talking bug" which may influence the activities of citizens or groups, thus requiring a warrant under the Fourth Amendment, undercover operatives present an even stronger case for protection under the Constitution. While citizens may arguably have no reasonable expectation of privacy that their confederates will not report their conversations to authorities, we do believe law abiding citizens have a reasonable expectation of privacy that government undercover agents are not monitoring their conversations or investigating, through the offer of bribes or other inducements, their disposition to commit a crime. 148/

While the courts have not constitutionally required such a warrant, 149/ the Congress should do so by statute, with respect to undercover operations following the precedent of the Foreign Intelligence Surveillance Act which created a judicial warrant for national security wiretaps. 150/

The statute would provide for a federal district court judge to consider applications for targeting persons or groups in an undercover operation which are approved by the Director, or head of any law enforcement agency conducting such operations, stating (1) the nature of the operation, (2) the basis for conducting the operation, (3) the objective facts and circumstances which indicate that the subject or subjects of the application are engaging or likely to engage in criminal conduct, (4) the reasons why less intrusive means will not suffice for the investigative purpose, and (5) the steps that will be followed to minimize invasion of privacy or other substantial risks to personal liberties. The statute would authorize the judge to approve the application if the standards were met. At least in cases where the intrusion is into zones of privacy protected by the Fourth Amendment there would have to be a formal finding of "probable cause." Provision can also be made for modification or renewal of the application and for emergency exceptions provided such exceptions are promptly brought before the court. The government would have the right to appeal a denial of an application to an appeals court.

Of course, this will place a new burden on our law enforcement agencies, but we believe it is fully justified by the intrusiveness of the technique and the analytic similarity between it and other techniques subject to a warrant requirement under the Fourth Amendment. Nor do we believe it is an undue burden. In all likelihood the courts would approve most applications, not because they will serve as a "rubber stamp", but because the necessity to go before a neutral magistrate will cause the government to document the basis for investigation and deter it from seeking warrant authorization in cases where it has no reliable factual basis for investigation. This is the very purpose and reason for the reform.

To enforce the warrant requirement, Congress should establish a civil damage action against the government available to any person targeted by an undercover operation without a court warrant. The Director of the FBI, or head of any agency conducting undercover operations, would be required to conduct a disciplinary hearing concerning agents who engage in unauthorized targeting of citizens and issue a public report as to disciplinary actions taken and the reasons for particular disciplinary decisions.

6. Supervision Requirements

Once appropriate standards are adopted, proper supervision of undercover operations will help to insure that standards and procedures are followed. We have already made two recommendations which we believe will improve the internal supervision of specific operations:

> -- that all applications for the initiation, modification, extension, or renewal of undercover operations be approved by the Undercover Operations Review Unit; 151/ and
>
> -- that a formal independent judicial authorization process be adopted for targeting persons or groups in particular undercover operations.

Additional statutory requirements for the supervision of undercover operations need to be adopted. The decision as to how to meet these requirements through the issuance of guidelines should be left up to the Attorney General and the FBI Director.

First, undercover operations should be designed and conducted to insure compliance with guideline standards and procedures. The Attorney General and the FBI Director may mandate training for agents, requirements to instruct informants as to the "rules of the game", the planning of operations with guideline compliance in mind, the appointment of supervisors tasked to monitor guideline compliance. 152/

Second, the Justice Department should review the suitability determination for each informant or cooperating source and insure that they are properly controlled and supervised or terminated if they violate FBI instructions or procedures. 153/

Third, all meetings and contacts between agents, informants and others should be recorded or memorialized and procedures adopted to permit contemporaneous review of this record. This was a major managerial failure in Abscam and guideline procedures need to be developed to correct it. 154/

Fourth, all information as to the reliability of informants or other persons relied on by the FBI for operational assistance (including middlemen) must be made a part of the record. In future Abscams, supervisors and those who approve operations should be apprised of all information as to the reliability or unreliability of informants or middlemen.

Fifth, in major operations, FBI and Strike Force supervisors should be designated at the field level to monitor the operations and report to designated supervising FBI and Justice Department teams in Washington. The guidelines should provide for daily communication, frequent meetings, and on-site inspection by FBI Headquarters and Justice Department teams. The teams would be assigned to insure compliance with guidelines and procedures and to report failure or departures from procedures to the Undercover Operations Review Unit, the Director, and the Attorney General or his designate. 155/ No operation should be conducted for more than 90 days without supervisory review.

7. Absolute Prohibitions

Under current guidelines, the Director apparently may authorize the use of undercover operations for purposes which are so dangerous and intrusive that we believe Congress should act to prohibit these activities. In particular, the guidelines permit the Director to authorize undercover operations which may involve substantial risks of violence or injury to persons or which may intrude upon or interfere with confidential communications and relationships. 156/ Congress should respond by prohibiting:

> -- the FBI from authorizing undercover activities if there is a reasonable risk that as a consequence of the activities violence may occur or result in injury to third parties;
>
> -- the FBI from using an undercover employee or cooperating individual from posing as an attorney, physician, clergyman, or member of the new media for purposes of establishing a professional or confidential relationship with private individuals;
>
> -- the FBI from permitting undercover employees or cooperating sources from adopting a pretext or pose in order to

> solicit privileged or confidential information from an attorney, physician, clergyman, or other person under the obligation of a legal privilege of confidentiality; and
>
> -- the FBI from permitting an undercover employee or cooperating source from givingtestimony in any proceeding in an undercover capacity in a manner which denies due process rights to any person.

IV. Conclusion

The conduct of FBI undercover operations is an issue of vital importance to the public, the Congress, and all who are concerned with the need to strike a proper balance between law enforcement functions and the protection of civil liberties. We reject the argument that effective law enforcement requires the maintenance of the kind of FBI discretion that led to Abscam. We believe that the rights of all Americans are endangered by permitting the FBI to retain such discretion, and that crime and corruption can be adequately investigated and prosecuted without wisk to civil liberties or compromises of American values.

We hope that this report will generate wide public debate and that out of congressional hearings and deliberations a consensus will develop around the wisdom of enacting an investigatory charter for the FBI that incorporates the recommendations of this report. Certainly our traditions command it.

FOOTNOTES

ACLU REPORT ON FBI UNDERCOVER OPERATIONS

1 / Our basic sources are the hearings of the Senate Select Committee to Study Law Enforcement Undercover Activities. Hereinafter referred to as Senate Select Committee Transcripts. The Transcript is unpublished to date and so references will be to particular statements and testimony with particular hearing dates and pages of the unpublished record noted. We also reviewed the record of the Hearings of the House Judiciary Subcommittee on Civil and Constitutional Rights. Hearings in 1980 and 1981 are contained in FBI Undercover Guidelines, Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the Judiciary House of Representatives (97th Congress 1st. Sess. Feb. 19, 25, and 26) (G.P.O. Serial No. 18) Hereinafter cited as Edwards Committee Published Hearings. Recent House hearings are unpublished and hereinafter are cited as Unpublished Edwards Committee Hearings with particular statements and testimony keyed to dates and pages.

2 / Attorney General's Guidelines On FBI Undercover Operations, January 5, 1981.

3 / Statement of Philip B. Heymann, former Assistant Attorney General of the United States, Unpublished Edwards Committee Hearings, supra note 1, pgs 8-9 (June 3, 1982).

4 / See note 1, supra. We also reviewed the briefs filed in the Due Process Hearings in Abscam as well as the court decisions involving Abscam defendants. These will be cited where appropriate.

5 / Prepared Statement, American Civil Liberties Union, FBI Charter Act of 1979, S. 1612, Hearings Before the Committee on the Judiciary, United States Senate (96th Cong. 1st Sess. Part I, Serial No. 96-53) pp. 253-270. (Hereinafter cited as ACLU FBI Charter Testimony). See also, Prepared Statement, American Civil Liberties Union on Need for FBI Charter, FBI Statutory Charter, Hearings Before the Committee on the Judiciary, United States Senate (95th Cong. 2nd Sess. Part I April 20 and 25 1978) Hereinafter cited as ACLU Need for Charter Testimony.

6 / See ACLU FBI Charter Testimony, note 5 supra, p. 257. The FBI Commentary accompanying S. 1612 did not exclude undercover operations from preliminary inquiries. Neither do the current Attorney General's Guidelines On Criminal Investigations of Individuals and Organizations, December 2,1980. Undercover Operations are

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permitted in "inquiries" based on unsubstantiated allegations provided high level authorization is obtained. See Section D (5)which lists excluded techniques and (6) which does not bar undercover operations. The Guidelines state that "they are consistent with the requirements of the proposed FBI Charter Act but do not depend upon passage of the Act for their effectiveness."

7 / Opening Statement of Senator Charles McC Mathias, Committee Chairman, *Senate Select Committee Transcripts*, note 1 *supra*, July 20, 1982, pp. 4-5.

8 / Edwards, Don, "Worry That You Could Be a Victim" Outlook Section, *Washington Post*, Sunday, Sept. 19, 1982, p. B 1.

9 / Mathias, *Op*. *Cit*, pp. 5-6.

10/ *Ibid*. p. 6.

11/ Testimony of Oliver B. Revell, *Senate Select Committee Transcripts,* note 1 *supra,* July 20, 1982, p. 23.

12/ *Report to the Select Committee of the Review By Its Counsel of the Confidential Abscam Files of the FBI*, August 18, 1982, p. 34.

13/ *Senate Select Committee Transcripts*, note 1 *supra*, July 21, 1982, p. 131.

14/ *Unpublished Edwards Committee Hearings*, note 1, *supra*, April 29, 1982, p. 74.

15/ See test accompanying note 3 *supra*.

16/ Introductory Paragraphs, *Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations*.

17/ See generally Sections III and IV, *Report to the Select Committee by Its Counsel*, note 12, *supra*, pp. 5-13.

18/ *Ibid*. pp. 5-6. See also Testimony of FBI Director William Webster, *Unpublished Edwards Committee Hearings*, note 1 *supra*, April 20, 1982, p. 20.

19/ *Ibid*. p. 7. See also Webster, *Ibid*. p. 21.

20/ *Ibid*. p. 11. See also Webster, *Ibid*. p. 23.

21/ Testimony of Philip B. Heymann, Assistant Attorney General Criminal Division, Department of Justice, *Edwards Committee Published Hearings*, note 1 *supra*. p. 132.

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22/ Ibid. pp. 131-132.

23/ Ibid. p. 132.

24/ Ibid. p. 133.

25/ Statement of Philip B. Heymann, Professor of Law, Harvard Law School, Unpublished Edwards Committee Hearings, note 1 supra, June 3, 1982, p. 15.

26/ Op. Cit. p. 132.

27/ Statement, note 25 supra. p. 15.

28/ "This provides," in Mr. Heymann's view, "the strongest possible protection against any unwitting involvement by individuals brought in by intermediaries or who are encountered directly." Op. Cit. p. 132.

29/ Testimony of Francis M. Mullen, Executive Assistant Director, Federal Bureau of Investigation, Senate Select Committee Transcripts, note 1 supra, July 21, 1982, p. 31.

30/ Ibid.

31/ Report to the Select Committee by Its Counsel, note 12 supra, p. 9.

32/ Ibid.

33/ Prepared Statement of Francis M. Mullen, Senate Select Committee Transcripts, note 1 supra, July 21, 1982, p. 10. (Not keyed to transcript pagination)

34/ Testimony of Francis M. Mullen, note 29 supra, p. 62.

35/ Report to the Select Committee by Its Counsel, note 12 supra, pp. 10-11.

36/ Ibid. p. 10.

37/ Prepared Statement of Francis M. Mullen, Senate Select Committee Transcripts, note 1, supra, July 21, 1982, p. 11. (Not keyed to transcript pagination)

38/ Report to the Select Committee by Its Counsel, note 12 supra, p. 12.

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39/ Ibid. p. 12.

40/ Op. Cit. p. 10.

41/ On naming representative "Ozzie" Myers, see Report to the Select Committee by Its Counsel, note 12 supra, p. 13. On setting up McDonald, see Report pp. 19-21, 32. On not briefing the local politician, see Report, p. 32 On the phony immigration official, see Report, p. 32.

42/ Testimony of Francis M. Mullen, note 29 supra. p. 51.

43/ Prepared Statement of Philip B. Heymann, note 25 supra, p. 5-7. Prepared Statement of Irvin B. Nathan, Senate Select Committee Transcripts, note 1 supra, pp. 27-29. (Keyed to statements submitted not transcript pagination)

44/ Ibid.

45/ Testimony of Francis M. Mullen, note 29 supra, p. 53.

46/ Testimony of William Webster, note 18 supra, p. 46.

47/ Ibid. p. 48

48/ Attorney General's Guidelines on FBI Undercover Operations, Paragraph J (3)(a), p. 14.

49/ Ibid. Paragraph J (3) (b) p. 14.

50/ Statement of Philip B. Heymann, note 25 supra. p. 15. Prepared Statement of Irvin B. Nathan, note 43 supra, pp. 18-20. (Not keyed to transcripts)

51/ Testimony of Irvin B. Nathan, Senate Select Committee Transcripts, note 1, supra, pp. 119-120.

52/ Testimony of William Webster, Edwards Committee Published Hearings, note 1, supra, p. 139. Philip B. Heymann also stated that "we seek to take every possible precaution against involvement of the innocent. Such precautions involve a careful evaluation of anything we are told by intermediaries about the possible interest of other persons in a criminal transaction, and an attempt to check such claims to the extent practicable." Testimony of Philip B. Heymann, note 21, supra, p. 132.

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53/ Testimony of Irvin B Nathan, note 51 *supra*, p. 123.

54/ Testimony of Michael Wilson, Assistant Section Chief, Personal and Property Crimes Section of the Criminal Investigative Division, *Senate Select Committee Transcripts*, note 1, *supra*, pp. 27-28 (July 22, 1982).

55/ *Ibid*. p. 29.

56/ *Ibid.* p. 29.

57/ Testimony of Irvin B. Nathan, note 51 *supra*, pp. 118-119.

58/ *Ibid*. p. 120.

59/ *Ibid*. p. 121.

60/ See text accompanying note 25, *supra* and Prepared Statement of Irvin B. Nathan, note 43 *supra*, pp. 18-21.

61/ See generally Section X, "The Use of Unwitting Middlemen As A Technique For Identifying Suspects And Establishing Reasonable Suspicion" in *Report to the Select Committee by Its Counsel*, note 12 *supra*, pp. 28-34.

62/ *Ibid*. p. 32.

63/ *Ibid*. p. 32.

64/ *Ibid*. p. 32.

65/ *Ibid*. p. 33.

66/ Transcript of Testimony of Irvin Nathan, *Senate Select Committee Transcripts*, note 1, *supra*, p.129-130 (July 29, 1982).

67/ *Op*. *Cit*. p. 33.

68/ *Op*. *Cit*. p. 130.

69/ *Ibid*. p. 130.

70/ Testimony of Michael Wilson, note 54 *supra*, pp. 41-46.

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71/ Transcript of Testimony of Irvin Nathan, note 66 supra, p. 130.

72/ Report to the Select Committee by Its Counsel, note 12 supra, p. 29.

73/ Ibid. p. 30.

74/ Testimony Transcript of Michael Wilson and Oliver B. Revell, Senate Select Committee Transcripts, note 1, supra, p. 67 (July 22, 1982)

75/ Report to the Select Committee by Its Counsel, note 12 supra, p. 31.

76/ Ibid. p. 30.

77/ Ibid. p. 31.

78/ Attorney General's Guidelines on FBI Undercover Operations, pp. 13-14.

79/ In entrapment, the focus is not on governmental conduct as on the mental state and prior behavior of the defendant caught in a criminal act. As Chief Justice Warren stated in Sherman v. United States, 356 U.S. 369, 372 (1958), "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." The predisposition test has been upheld repeatedly, and undercover operations sanctioned. See Hampton v. United States, 425 U.S. 484 (1976);United States v. Russell, 411 U.S. 423 (1973).

80/ Testimony of Oliver B. Revell, note 11 supra, p. 114-115.

81/ See Testimony of FBI Director William Webster, Unpublished Edwards Committee Hearings, note 1, supra, April 20, 1982, pp. 17-18. Prepared Statement Francis M. Mullen, Jr. Senate Select Committee Transcripts, note 1, supra, p. 22. See generally Prepared Statement of Irvin B. Nathan, note 43 supra.

82/ Report to the Select Committee by Its Counsel, note 12 supra, p. 8.

83/ Ibid. pp 16-17

84/ Ibid. pp 16-24.

85/ Ibid. pp. 14-15

86/ For example, Thomas Puccio, who headed the New York Strike Force and advised the FBI agents in the field had this to say about the Guidelines enforcement: "Be that as it may, we gave legal advice to the FBI. They had a lot of their own internal rules to follow, I suppose. I was not that much concerned with the FBI's internal rules. I was concerned with what the law was and what it took to make a case and a prosecutable case, because ultimately , we are the judge of that..." Testimony of Thomas Puccio, *Senate Select Committee Transcripts*, note 1, *supra*, p. 116 (July 27, 1982).

87/ *Report to the Select Committee by Its Counsel*, note 12 *supra*, pp. 5, 8.

88/ See generally Testimony of Michael Wilson, Assistant Section Chief, Personal and Property Crimes Section of the Criminal Investigative Division, *Senate Select Committee Transcripts*, note 1, *supra*, pp. 1-65 (July 22, 1982).

89/ *Op*. *Cit*. p. 13.

90/ *Ibid*. p. 28-29.

91/ Statement of Philip B. Heymann, *Unpublished Edwards Committee Hearings*, *supra* note 1. Statement (6/3/82); Testimony of Irvin Nathan, *Senate Select Committee Transcripts*, note 1, *supra* (7/29/82).

92/ *Op*. *Cit*. pp. 5,8. See generally, Testimony of Oliver B. Revell, Assistant Director, Criminal Investigative Division, FBI, *Senate Select Committee Transcripts*, note 1, *supra*. (July 20, 1982).

93/ See Text accompanying note 14 *supra*.

94/ *Report to the Select Committee by Its Counsel*, note 12 *supra*, p. 14.

95/ *Attorney General's Guidelines on FBI Undercover Operations*, Definitions p. 1. See also Paragraph B (g),(h),(i),(j)which all deal with information collection by undercover operatives. *Guidelines*, pp. [illegible]5.

96/ *Ibid*. pp 4-5. See Paragraph B, (g),(h),(i),(j).

97/ See generally, "*Final Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities*", *Book II*, U.S. Senate (94th Cong., 2d Sess., Report 94-755 (Government Printing Office: April 26, 1976).

98/ *Attorney General's Guidelines on FBI Undercover Operations*, Paragraph F (3) (c),(d), (e). p. 9.

99 / *Hampton v. United States*, 425 U.S. 484 (1976). In Hampton the Supreme Court upheld an undercover operation involving the sale of narcotics to the defendant by a government directed informant and the subsequent purchase of the drugs from the defendant by government agents leading to the defendant's conviction for selling drugs. In an important concurring opinion, Justice Powell stated that "the cases, if any, in which proof of predisposition is not dispositive will be rare." 425 U.S. at 495 n.7.

100/ *United States v. Russell*, 411 U.S. 423 (1973), the conviction of a drug manufacturer was upheld even though the government supplied the essential chemicals for the illicit drugs. The Court, rejecting claims that the goverment was too deeply involved, quoted *Sorrells v. United States*, 287 U.S. 435, 441, and noted "'that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution.' ..Nor will the mere fact of deceit defeat a prosecution, ... for there are circumstances where the use of deceit is the only practicable law enforcement technique available."

101/ Although Supreme Court decisions hold that in some cases government conduct in an undercover operation might reach "a demonstrable level of outrageousness" to warrant barring a conviction on due process grounds even where the defense of entrapment is not technically available, see *United States v. Russell*, note 100 *supra*, the courts, with one exception, *United States v. Kelly* (Civil Action No. 80-00340 D.D.C.)(Judge William Bryant), have not found Abscam to even approach this level. See *United States v. Myers, et. al.*, 527 F. Supp. 1206 (E.D.N.Y. 1981 (Judge Pratt Due Process Opinion); *United States v. Jannotti*, 673 F. 2d 578 (3rd Cir. 1982) (en banc.); *United States v. Alexandro*, 675 F. 2d 34 (2nd Cir. 1982) See also *United States v. Myers*, 635 F. 2d 932 (2nd Cir. 1980).

102/ See *United States v. White*, 401 U.S. 545 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *On Lee v. United States*, 343 U.S. 747 (1951). In part this is based on historical grounds that framers did not intend to bring undercover investigators within the scope of the Fourth Amendment. Most important, the Court has justified the distinction on the assumption of risk of betrayal by one's supposed friends and confidants. Because this "is not an undue risk to ask persons to assume," the Fourth Amendment does not protect the individual's misplaced confidence that a person to whom he discloses information will not later disclose it. *Lopez v. United States*, 373 U.S. 427, 450 (1963).

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103/ Such a standard *may* be implied from the "reasonable suspicion" standard adopted by the Court in "stop and frisk" cases. *Terry v. Ohio*, 392 U.S. 1 (1968). The formulation in *Terry* is used in the current *Attorney General Guidelines on Domestic Security Investigations* issued in 1976.

104/ *Foreign Intelligence Surveillance Act of 1978*, Public Law 95-511, Oct. 25, 1978 (95th Cong., 92 Stat. 1783).

105/ *Right to Financial Privacy Act of 1978*, Title XI of the *Financial Institutions Regulatory and Interest Rate Control Act of 1978*, Public Law 95-630 (95th Cong. 92 Stat. 3641).

106/ *First Amendment Privacy Protection Act*, Public Law 96-440, Title I, § 101, Oct. 13, 1980, 94 Stat. 1879.

107/ *Statement of William H. Webster Director Federal Bureau of Investigation Before the Subcommittee on Security and Terrorism United States Senate Concerning Domestic Security Guidelines On June 24, 1982*.

108/ The Senate Committee has brought to light the FBI's internal rewriting of the definition of public officials subject to undercover operations without any public notification of the change. See Testimony of Oliver B. Revell, *Senate Select Committee Transcripts*, note 1 *supra* pp. 50-56.

109/ Without statutory requirements to keep oversight committees "fully and currently" informed, oversight is also difficult. The Select Committee staff has commented on its inability to obtain necessary documents to conduct oversight of undercover operations pursuant to S. Res. 350. As Deputy Counsel Wheeler stated to Irvin Nathan: "My concern with (congressional oversight) is that it is all well and good to say that the guidelines should be enforced internally by the Department as overseen by the appropriate committees of the Congress. But the problem is that my experience in representing this Committee has shown me that it is very difficult for Congress to oversee the FBI and the Department of Justice. We cannot get documents like the Luskin Report, after weeks of asking for them. We had to struggle mightily to get the documents that we did get and we got them under severe limitations. We find, on interviews with the FBI---and this has come out in these hearings--that the FBI unilaterally, without publishing any amendments or without the Justice Department publishing any amendments, has interpreted and revised the terminology of the guidelines. And again, this happens without copies of these documents being forwarded to Congress."

Testimony of Irvin Nathan, *Senate Select Committee Transcripts*, note 1 *supra*, pp. 140-141 (July 29, 1982).

110/ See generally *ACLU FBI Charter Testimony*, note 5 *supra*.

111/ *Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations*, Paragraph C (1) p. 2. (December 1980)

112/ *Ibid*. p. 1 Paragraph B (2) (Racketeering Enterprise Investigations). See also *Attorney General's Guidelines on Domestic Security Investigations*, Paragraph I. p. 3 (April 1976).

113/ *Attorney General's Guidelines on FBI Undercover Operations*, p. 13 (Jaunary 1981).

114/ Essentially, we adopt the original formulation by former Assistant Attorney General Philip B. Heymann, see text accompanying note 22 *supra*.

115/ *Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations*, paragraph D (1), p. 6 (December 1980)

116/ *Attorney General's Guidelines on FBI Undercover Operations*, General Authority (2), p. 2 (January 1980).

117/ See note 6 *supra*.

118/ As FBI Director William Webster has testified:"The guidelines recognize that inducements may be offered to an individual even though there is no reasonable indication that the particular individual has engaged in or is engaging in illegal activity that is properly under investigation. However, the guidelines provide that no such undercover operation shall be approved without the authorization of the director." Testimony of FBI Director William B. Webster, *Edwards Committee Unpublished Committee Hearings*, note 1 supra, p. 16 (April 29, 1982).

119/ The Senate Committee Counsel have noted that internal FBI and Justice Department documents "reflect no attempt by the FBI or other Department of Justice personnel to obtain extrinsic evidence of the reliability of the representations of any middleman--for example, the evidence of reliability that is required for law enforcement officers to obtain a search warrant on the basis of statements by an informant. See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Spinelli v. United States*, 393 U.S. 410, 415-16 (1969)." *Report to the*

Select Committee By Its Counsel, note 12 supra, p. 14. Congress should require the FBI to develop such extrinsic evidence to justify an undercover operation.

120/ Testimony of John Good, Supervisory Resident Agent, Federal Bureau of Investigation, Senate Select Committee Transcripts, note 1, supra, p.48-49 (July 22, 1982).

121/ Chief Counsel James Neal made this observation: "(E)verybody has said, 'Well, we have got to go ahead with these middlemen. We cannot say, 'Do not bring them in', because that would blow our cover." That just seems to me to be a cover you could say to somebody like Silvestri, "Look, I want to know why you are saying this. The FBI might get us if you bring a man in who is not corrupt." In other words, it seems to me that you could probe these middlemen in a way that would advance your cover and still get more information about the reliability of that information." Ibid. p. 59.

122/ See text accompanying note 41 supra.

123/ As Senator Huddleston queried: "I am curious as to why you and whoever made the decision felt that the matter of dealing with immigration problems on a paid basis was in fact a crime problem area inasmuch as in the 200-year history of the United States there has only been one prosecution of any Congressman on any charge relating to bribery connected with immigration matters." Testimony of Francis M. Mullen, Senate Select Committee Transcripts, supra note 1, pp 124-125. July 21, 1982.

124/ It was decided by the Supreme Court in 1979. United States v. Helstoski, 442 U.S. 477 (1979). But this was enough for Mr. Puccio, the Strike Force Leader in New York: "I had a sense, maybe based upon what I read in the newspapers, based upon the publicity given to the Helstoski case, that this was a tremendous area of abuse..." Testimony of Thomas Puccio, Senate Select Committee Transcripts, note 1, supra, p. 90. July 27, 1982.

125/ Statement by Senator Charles McC Mathias, Senate Select Committee Transcripts, note 1 supra, p.

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126/ Testimony of Irvin Nathan, Senate Select Committee Transcripts, note 1 supra, p. 134 (July 29, 1982).

127/ Attorney General's Guidelines on FBI Undercover Operations, Paragraph C, p. 5.

128/ Ibid. Paragraph A, pp. 2-3.

129/ Ibid. Paragraph B, pp. 3-5.

130/ Ibid. Paragraph M (2) p. 15.

131/ Report to the Select Committee of the Review By Its Counsel, note 12 supra, p. 5.

132/ Op. Cit. Paragraph M (2). See Testimony of Oliver B. Revell, Senate Select Committee Transcripts, note 1 supra, pp. 73-75.

133/ Irvin Nathan has endorsed this recommendation. Prepared Statement of Irvin B. Nathan, Senate Select Committee Transcripts, note 1 supra, pp. 41-42 (July 29, 1982) (Not keyed to transcript pagination but to statement as submitted)

134/ Op. Cit. Paragraph J (3) (a) p. 14.

135/ Ibid. Paragraph J (3) p. 14.

136/ Ibid. Paragrahp J (3) (b) p.14.

137/ Ibid. Paragraph J (3).

138/ See note 119 supra.

139/ As Chief Counsel Neal states: "(I)t seems to me that it would advance your cover--and you know how you do when you are using an informant for the basis of getting a search warrant. If that informant makes a bald conclusory statement that there is contraband somewhere in the house, you ask him, 'How do you know about this? Have you been in the house? When were you in the house? What is the basis of that conclusiory statement? When you say Congressman A or Senator B will take a bribe, what is your basis for that? Why do you say that? Do you know of a situation before where he has done that?' That is the kind of thing it seems to me that you could probe with these middlemen, test their reliability, their basis for the information, and still advance--not blow--your cover." Senate Select Committee Transcripts, note 1 supra, pp. 59-60 (July 22, 1982)

140/ This did not happen in Abscam. Report to the Select Committee By Its Counsel, note 12 supra, p. 31.

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141/ See note 120 and 121 supra.

142/ See Text accompanying note 121 supra.

143/ See Text accompanying notes 57, 58 and 59 supra.

144/ As Deputy Counsel Wheeler stated in response to the argument by Irvin Nathan that probing for reliable information as a basis for targeting is "selective targeting": "That, I submit to you, Mr. Nathan, is a strawman, because in fact, if the reason that 'No' was said with respect to certain people such as Senator Pressler, and 'No' was said pursuant to firm, clear, unequivocal, proper guidelines such as 'Do not invite a person before the camera unless you have a statement by a middleman in which he represents to an agent or on tape that an agent can listen to that this Congressman or this official will accept a bribe,' then in fact you cannot criticize the FBI after the fact because they can say, 'Look, all we are doing was following a pre-established, unequivocal policy, and all we did was apply it." Senate Select Committee Transcripts, note 1 supra, p. 117. (July 27, 1982)

145/ United States v. United States District Court, 407 U.S. 297, 317 (1972).

146/ Wilson, James Q., "The Real Issues in Abscam", Washington Post, July 15, 1982, reprinted in Congressional Record, S8535, July 16, 1982.

147/ See note 5 supra.

148/ Professor Goeffrey Stone of the University of Chicago Law School made this point before the Edwards Committee in testifying on undercover operations: "It is true, of course, that in the ordinary course of our relationships we necessarily assume the risk that our friends and associates will betray our confidences. Insofar as such persons act solely in their private capacities, and not in cooperation with governmental officials, their betrayals undoubtedly fall beyond the scope of the amendment's concern. The analysis shifts markedly, however, once government enters the picture. For the risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality an undercover agent commissioned in advance to report the individual's every utterance or misplaced confidence inherent in the nature of human relationships; we are dealing instead with government action designed explicitly to invade our privacy and to end in deceit and betrayal--with government action that appreciably alters the nature of the risks we ordinarily expect to assume. The notion that our willingness to assume one risk means that we must necessarily assume the other is doubtful at best. Indeed, from a constitutional standpoint, we necessarily assume the risk that private citizens will invade our privacy by tapping our telephones, bugging our offices, and ransacking our homes. It has never been suggested, however, that because those risks are unprotected by the Fourth Amendment we must also assume the risk that government agents will engage in similar conduct or induce others to do so for them. There is simply no logical reason to assume that the risk of undercover surveillance is any more 'inherent' in our society than the risk that government officers will tap our telephones, bug our offices, or ransack our dwellings. *Edwards Committee Published Hearings*, note 1 *supra*, p. 4-5.

149/ See cases cited at note 102 *supra*.

150/ See note 104 *supra*.

151/ See text accompanying notes 127 through 133 *supra*.

152/ Senator Huddleston's point is well taken: "(I)t would be very proper that when guidelines do exist--and now, we do have a set of, I guess, general guidelines, and they even might be altered for a specific operation--that there ought to be a clear understanding between FBI operators, the agents, and the attorneys with the Strike Force. It seems to me they ought to review them together and say, 'These are the rules of this particular game that we are playing." *Senate Select Committee Transcripts*, note 1 *supra*, p. 60 July 29, 1982.

153/ The current *Attorney General's Guidelines on FBI Use of Informants and Confidential Sources* (December 2, 1980) require a suitability determination to be made. Paragraph D. p. 2. What is troubling about the guidelines is that there is no indication of what "unsuitability" might be. For example, there is no outright prohibition on the use of an informant who has engaged in serious acts of violence or acted as an agent provocatur. Such standards should be included. Moreover, as Oliver B. Revell has testified, the suitability determination is not reviewed by the Justice Department Undercover Operations Review Committee. Testimony, *Senate Select Committee Transcripts*, note 1, *supra*, p.76-77 (July 20, 1982). How can the UORC even determine whether to rely on the information being supplied by the informant let alone that he or she will obey FBI or Justice Department rules? The UORC should review these determinations. Finally, there are no strict requirements that an informant be terminated if he violates guideline strictures (e.g. engages in violence, incites criminal acts). Termination standards should be included.

154/ See Prepared Statement of Philip B. Heymann, Unpublished Edwards Committee Hearings, note 1 supra June 3, 1982

155/ As Senator Huddleston recommends: "In any particular undercover operation...those who are the operators, the FBI agents, and the attorneys, Strike Force attorneys, the ones that are closest to the field and closest to the actual operation, that they, at least prior to and perhaps during the course of the operation, review those guidelines and make sure that they are both operating on the same wavelength." Senate Select Committee Transcripts, note 1 supra p. 152 (July 27, 1982) We would require FBI Headquarters and UROC representatives to participate in such ongoing reviews in major operations.

156/ See paragraph (B), Attorney General Undercover Operations Guidelines, (January 1981).

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Senator **Mathias**. Thank you. I think you stated very accurately the old maxim that the best threatens the good, and that is what we are faced with at this point.

Mr. **Berman**. Well, we learned in the FBI and CIA charter endeavors that by trying to get fundamental reform we have no charters as a consequence.

Senator **Mathias**. We had better make progress where we can.

Mr. **Berman**. I think so.

Senator **Mathias**. Professor Freedman.

STATEMENT OF MONROE H. FREEDMAN

Mr. **Freedman**. Thank you, Mr. Chairman, for the invitation to testify here. I agree with the goals of the sponsors of S. 804. I admire the conscientious effort of the subcommittee in a complex, delicate matter, and I commend the subcommittee and its staff for their achievement in producing S. 804 and the extremely important report that accompanies it.

But I do believe that some additional safeguards should be included, and in making these recommendations, I am going to focus on undercover investigations that are directed against lawyers and judges.

Some of these recommendations may well be applicable to other sensitive areas as well, but I am going to restrict myself to the area in which I have been working most intensively for the last 15 or 20 years.

Let me begin by telling you about a lawyer in New York, named Harry Levine. He was in his law office one day and he got a telephone call. The man at the other end said, "Mr. Levine, I am standing in my bedroom. I have just shot my wife. She is dead on the floor. I am standing here holding the smoking gun. What should I do?" After only a moment's hesitation, Levine replied, "Oh, you want Harry Levine the lawyer!" [Laughter.]

It illustrates a problem that I see increasingly as I speak to bar groups across the country, that is, lawyers who are becoming afraid to be lawyers, afraid to provide the effective assistance of counsel that the sixth amendment guarantees to their clients, afraid to give the zealous representation that the Code of Professional Responsibility demands, and afraid, in short, to be what the American Bar Association has called: the client's "champion against a hostile world."

I have heard more than one lawyer say to me, "I have to keep asking myself when I am talking to a client, 'Is this really a client or is somebody trying to set me up?' "

When you have that kind of impairment of the sixth amendment right to counsel, innumerable other basic rights are compromised.

We do have to maintain integrity in the administration of justice, and I think to that end some undercover operations are necessary. There is a basic problem, however, with prosecutorial discretion to target particular individuals—what Justice Jackson—who had before that been Attorney General of the United States—referred to as the most dangerous power of the prosecutor, where the crime becomes being obnoxious to the prosecutor or getting in the way of the prosecutor.

That general difficulty of prosecutorial discretion is compounded by an extremely serious conflict of interest for example, when the judge who is targeted, is one who has been conscientious in upholding the constitutional rights of criminal defendants who appear before the judge, or when the lawyer who is targeted by the prosecutor is one who has been zealous in defending his or her client's sixth amendment rights.

Even if, in fact, there is no such motive, we have an extremely serious and undeniable appearance of impropriety, and of conflict of interest in such cases.

That prosecutorial power and that potential for abuse has already begun to undermine the independence of the bar which is essential to a free society.

This committee has achieved a significant insight and a major success in S. 804 in developing two standards for undercover operations. One is for ordinary situations, in which of reasonable suspicion can be decided by the head of a field office. The other is for more sensitive or particularly delicate situations for example, dealing with political and religions groups or with the press, where the standard is "probable cause to believe that the operation is necessary to detect or to prevent specific acts of ciminality," and that determination in those particularly sensitive cases must be made by the Undercover Operations Review Committee.

There are two kinds of operations, however, which are not covered by that higher standard and, I think, must be. One is the case of the sham client, where the undercover operative is posing as a client and misleading the lawyer into thinking that the lawyer is dealing with someone who genuinely is in trouble and in need of legal services.

The other is a case, indeed, where I think that undercover operations should be forbidden altogether, but which is not covered in this bill, and that is infiltration of a lawyer's office.

As I say, I think it should be forbidden altogether, but at the very least, that kind of undercover operation, if it takes place, should be subjected to the higher standard of probable cause and necessary.

Other recommendations that are made in my prepared testimony include concern that the statute provides no judicial oversight of prosecutorial discretion at the beginning, through a warrant requirement. Indeed, throughout the undercover operation, it is entirely a matter of executive discretion and control, with no provision for dismissal for abuse of discretion, and at the conclusion, no sanctions whatsoever through civil action or otherwise against abuse of discretion.

So what we have, in a Government that prides itself on separation of powers and checks and balances, is the most sensitive kind of Government intrusion of all, undercover operations, with the discretion exclusively in the executive department.

I would recommend that all three of those bases be covered, that there be a warrant requirement, that there be dismissal on a showing of an abuse of discretion in targeting, and that there be provision for civil action as well.

Also, none of the provisions in the statute deal directly with the conflict of interest on the part of the prosecutor, particularly again in the case of operations directed against judges and lawyers.

I would recommend that there be a requirement of a judicially appointed special prosecutor, independent of the Department of Justice, and therefore, free of any conflict of interest, to supervise all undercover operations that are directed against judges or lawyers.

Another serious problem is that of what prosecutors call trading up, and again focusing on the problem of the lawyer. A criminal defendant is convicted and is offered overwhelming inducement, indeed, unconsionable and cohersive inducement—it may be 10 years of liberty—if that convict will give evidence against his or her own former lawyer.

That kind of practice is distructive of the essential relationship of trust and confidence between lawyer and client, and I would, therefore, recommend that the statute say explicitly that whether the standard that is being applied be reasonable suspicion or probable cause, that it cannot be met by evidence received from a client alone, without substantial corroborative evidence from an independent source.

Next, as I suggested before, I would recommend that infiltration of a law office be forbidden but that, at least, it be required to be under the decisionmaking power of the Undercover Operations Review Committee, and on the probable cause necessary standard.

Further, there is established, of course, an Undercover Operations Review Committee, but the statute does not say what kind of vote has to be taken by that committee. I think it should be unanimous. I think that probably was intended. If not unanimous, it should at least be by a majority vote. And I think that majority should be required to include the two designated officials from the FBI and from the Office of Legal Counsel.

In addition, I think that the legislation should expressly forbid pretrial publicity by prosecutors and other law enforcement officials including media hypes through press conferences to announce indictments—which means to smear the accused and to convict them in the eyes of family, friends, neighbors and business associates without due process of law.

There should also be provision expressly for injury to reputation. That is one of the concerns that runs through the reports, both the House and the Senate. Under Supreme Court decisions, however, reputation may well be found not to be included under the phrase "injury to the person". There should be a specific reference, therefore, to injury to the person through defamation, with provision for punitive damages because of the extreme difficulty of identifying in dollars and cents the kind of injury that we are talking about.

Finally, there are some drafting discrepancies which are, I believe, unintended but could have some serious consequences, and my recommendations in that regard are on page 17 of my prepared statement.

Mr. Chairman, thank you very much for the invitation and for your interest in my views.

[The prepared statement of Mr. Freedman follows:]

PREPARED STATEMENT OF MONROE H. FREEDMAN

Mr. Chairman, and Members of the Subcommittee:

Thank you for inviting me to testify regarding S. 804--The Undercover Operations Act. I have been asked to provide relevant biographical information, and have done so in a footnote.[1]

My principal concern with S. 804 relates to undercover operations directed against corruption in the administration of justice. I do not mean that such investigations necessarily raise more serious problems than those directed against, say, political organizations, religious groups, or news agencies; indeed, some of my suggestions may be applicable to those areas as well. As one who has a particular interest in the professional responsibilities of lawyers and judges, however, I believe that I can be most useful to the Committee by focusing on that area.

A. The Special Need For Undercover Operations against Lawyers and Judges

There is surely no need to belabor the importance of integrity in the administration of justice, or the necessity to pursue any corruption vigorously. At the same time, we must recognize that undercover operations directed against lawyers and judges, if inadequately controlled, could have an even more severe impact on the administration of justice than whatever corruption exists.

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[1] Monroe H. Freedman is Professor of Law and former Dean of Hofstra University Law School. He has testified on several occasions before the Judiciary Committees of the United States Senate and House of Representatives, and has qualified as an expert witness on lawyers' ethics in federal and state proceedings, serving in one case as an expert on behalf of the United States Department of Justice. He has been chairman of three committees on legal ethics, and a member of the Governing Board of the District of Columbia Bar. He was also Reporter and principal draftsman of the American Lawyers' Code of Conduct, and his book, Lawyers' Ethics in an Adversary System, won the American Bar Association's Gavel Award Certificate of Merit. Professor Freedman also served as legislative consultant to Senator John L. McClellan.

I would like to be able to say that undercover operations are unnecessary because the bar is effectively policing lawyers and judges. That is not so. For example, the Code of Professional Responsibility is in force, substantially, in most jurisdictions in the United States. Disciplinary Rule 1-103(A) of that Code requires a lawyer to report unprivileged knowledge of dishonesty on the part of another lawyer. Yet that essential self-policing requirement has never to my knowledge been enforced. Also, in the District of Columbia, DR 1-103(A) was denounced as an "informer" provision, and the requirement to reveal dishonesty by another lawyer was deleted from the Code by a substantial majority vote of the bar.

In addition, the Code affords judges a special solicitude. Even if a lawyer has knowledge of judicial corruption, under DR 1-103(B) the lawyer is required to reveal that knowledge only upon "proper request" of an authorized investigatory agency. That is, in the absence of a specific request, lawyers are permitted to withhold knowledge of judicial corruption.[2]

Of necessity, moreover, the disciplinary rules relate to the limited situation in which a lawyer has received knowledge of dishonesty. There is not, nor should there be, a rule requiring lawyers to investigate each other, or judges, in order to seek out evidence of dishonest conduct.

If, therefore, we are to take seriously the problem of corruption in the administration of justice--and we must--there are going to be situations in which undercover operations are the only way to go about it. If there is probable cause to believe that a judge is soliciting bribes, that a lawyer is suborning (that is, corruptly inducing) perjury, or that a lawyer is manufacturing false claims and filing fraudulent complaints, then an undercover operation may be the only method to obtain the necessary proof to support a prosecution. Also, such an operation, to be successful, may require sham cases,[3] the filing of fraudulent claims, and the presentation of false testimony.[4]

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[2] The proposed Model Rules of Professional Conduct, Rule 8.3, would require a lawyer to inform the appropriate authority about dishonesty on the part of judges as well as lawyers. However, Rule 8.2 would have a chilling effect on any lawyer contemplating informing on a judge. Also, there is no reason to believe that the proposed rule would be enforced any more vigorously or effectively than the present one.

B. The Special Dangers of Undercover Operations against Lawyers and Judges

The dangers to the administration of justice that are presented by undercover operations against lawyers and judges would be difficult to overstate. I frequently speak to bar groups throughout the country, and discussion turns, almost invariably, to anxieties about sting operations directed against lawyers. Those discussions have convinced me that the possibility that a lawyer in any case may be facing a sham client in an undercover role has already had a chilling effect upon the effective assistance of counsel to which clients are entitled under the Sixth Amendment.

I have found lawyers who, in their interviews with clients, are fearful of being quoted (or tape-recorded) out of context; lawyers who are fearful of seeking to gain a client's trust by words of sympathetic understanding that might later be distorted and misconstrued;

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[3] For an illustration of a sham case, and the delicate issues that may be raised, see the careful opinion of Judge William G. Young of the Massachusetts Superior Court in Commonwealth v. Shulman (attached as Appendix A).

[4] It is nonsensical to suggest that a prosecutor who presents false testimony as a necessary part of an undercover operation is knowingly using perjured testimony or false evidence within the meaning of DR 7-102(A)(4). One might as well charge a firefighter with arson for setting a backfire to contain a forest fire.

and lawyers who are so intent upon covering their own flanks that their professional obligation of zealous dedication to the client's cause has been compromised. I have also seen significant evidence that some criminal defense lawyers have become fearful of offending prosecutors by vigorous representation of their clients.

When the right to counsel is thus impaired, other fundamental rights suffer. In criminal cases, denial of effective assistance of counsel results in the loss of due process of law and of equal protection of the laws, impairs the right to trial by jury, and may cause the loss of the privilege against self-incrimination, rights of autonomy, and protection against unlawful search and seizure. In a civil case, the client may also be deprived of the First Amendment right to petition for redress of grievances through the judicial system.

Thus, the devastating impact of undercover operations against lawyers are already being felt in the administration of justice, and the deleterious effects on some of our most precious rights are potentially enormous.

Other serious problems in the administration of justice are exacerbated by inadequately controlled undercover operations against lawyers and judges. Justice Robert Jackson (a former Attorney General) referred to the discretion to investigate as "the most dangerous power of the prosecutor," because it enables the prosecutor to "pick people he thinks he should get rather than pick cases that need to be prosecuted." Thus, law enforcement "becomes personal," with the risk that "the real crime becomes that of being...personally obnoxious to or in the way of the prosecutor himself."[5] Since those words were spoken, we have seen a "Get Hoffa Squad" in the Department of Justice and an Enemies List drawn up in the White House.

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[5] Address by Justice Jackson, Second Annual Conference of U. S. Attorneys, April, 1940.

It is realistic, therefore, to be deeply concerned about abuses of prosecutorial discretion to target those who are "in the way of the prosecutor himself"--a group that could well include judges who are conscientious in respecting the constitutional rights of criminal defendants, and defense lawyers who are zealous in representing their clients. Serious conflict-of-interest problems are raised, therefore, whenever a prosecutor's office initiates an undercover operation against a judge before whom members of that office have lost motions or cases, or against a lawyer who has defended clients prosecuted by that office.

Other common problems of prosecutors' professional responsibilities are heightened in such cases. As this Committee has seen, unlawful leaks to the press of secret grand jury information, and other prejudicial pretrial publicity, can be most severe in cases of undercover operations.[6] In Operation Greylord, for example, there were a number of grand jury leaks to the press, and United States Attorney Dan K. Webb held a dramatic pretrial press conference in which he condemned the defendants-to-be without due process, and unethically vouched for the probity of the witnesses he would be producing at trial.

Also, incomplete tape recordings of conversations between lawyers and clients can be particularly misleading when taken out of the full context of complex lawyer-client dialogues that may have extended over many weeks, or even years. For example, a lawyer who is properly reminding a forgetful or inarticulate client of facts related by the client in an earlier interview, may well appear, on a partial tape recording, to be prompting the client to testify falsely. Lawyers who are concerned about undercover investigations will therefore be inhibited in fulfilling their professional responsibilities.

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[6] It is no doubt futile to hope that a United States Attorney will conduct a sting operation in his or her own office, to identify the sources of grand jury leaks and other improper pretrial publicity.

"Trading up"--where a prosecutor bribes a defendant or a convict with leniency in exchange for evidence against someone whom the prosecutor wants to get--is a particularly vicious practice when it involves turning a client against his lawyer. The inducements to false testimony are often overwhelming, the reliability of the testimony under such circumstances is highly suspect,[7] and the adverse impact on the lawyer-client relationship in general, as a result of even one such case, could be considerable.

C. Proposed Revisions of S. 804

Remarks at the outset of this testimony should have made it clear that I consider some undercover operations against lawyers and judges to be necessary to maintain integrity in the administration of justice. I therefore agree with the goals of the sponsors of S. 804. In addition, I admire the conscientious effort they have made to cope with the awesome problems involved in such a complex and delicate matter. I believe, however, that certain additional safeguards should be included in the Undercover Operations Act, at least with respect to investigations directed against lawyers and judges.

The standard expressed in §§3803(a)(3) and (4) of S. 804 is a sound and essential one: there must be a finding of "probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality" before certain undercover activities may be undertaken. (Emphasis added) The activities properly subject to that standard include infiltration of a court and situations in which a government agent, informant, or cooperating individual "will pose as an attorney...and there is a significant risk that another individual will enter into a confidential relationship with that person...."

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[7] Witnesses who are found to have given false evidence in support of a prosecution are virtually never prosecuted for perjury, obstruction of justice, contempt of court, etc. (unless, of course, the prosecution perjury comes to light because the witness has recanted). That circumstance is another instance of a prosecutor's conflict of interest.

In addition, §§3803(b)(6) through (9) prevent the head of a field office from conducting undercover operations on mere "reasonable suspicion" in similar circumstances posing threats to the proper administration of justice. In particular, §3803(b)(7) relates to a situation in which an undercover employee or cooperating individual "will attend a meeting between a subject of the investigation and his lawyer."

Those are necessary and wise provisions. Yet serious problems remain, of both procedure and substance.

For example, the only oversight with respect to exercise of prosecutorial discretion and observance of the standards under S. 804 is by the Undercover Operations Review Committee, established in §3801(b)(6). That Committee must consist of at least six voting members, at least one of whom is an Assistant Director of the FBI and one a representative of the Office of Legal Council of the Department of Justice. The bill does not require, however, that the vote authorizing an undercover operation be unanimous--as it should be, at least in operations directed against lawyers and judges. In fact, there is not even an expressed requirement of a majority vote, nor a requirement that the two officials specifically designated in the statute must vote in support of an investigation in order to authorize it.

In addition, under §3803(e) there is no possibility of judicial review of any failure to comply with the standards or of any abuse of discretion; and under §3804(a) civil action is expressly denied for any injury caused by "operational or management decisions relating to the conduct of the undercover operation."

In short, therefore, prosecutorial discretion to target an individual--what Justice Jackson called "the most dangerous" power of all--is unfettered by any judicial oversight or sanction whatsoever. That is so even if the individual who is targeted is a judge who has earned the enmity of a prosecutor's office by conscientious concern for defendants' rights, or a lawyer who has been properly zealous in representing clients. Moreover, the lack of any after-the-fact sanction for targeting by an Enemies List is compounded by the absence of any requirement of a judicial warrant at the outset. Thus, the only control of prosecutorial (executive department) abuse of discretion is voluntary compliance by the prosecutors (executive department) themselves. Yet an area as sensitive as undercover operations is one that especially demands application of the fundamental American constitutional concept of checks and balances by one branch of government against another.

At the very least, therefore, provisions should be added that require a judicial warrant to initiate an undercover operation against judges or lawyers, and any prosecution resulting from a failure to abide by the standards or by an abuse of discretion should be subject to dismissal on that ground.

Also, the provision in §3804 for a tort claim against the United States relates to any person who suffers "injury to his person, or property, or death." That provision should expressly include injury to professional reputation; also, because the defamatory effects would be so hard to prove in dollars and cents (even though unquestionably present), punitive damages should be expressly allowed, even if limited by a statutory maximum amount.

In addition, §3804(a) covers injury resulting from non-criminal "negligence...in the supervision or exercise of control over an undercover operation" (emphasis added); but that section does not cover non-criminal conduct that wilfully causes injury to person, property, or reputation. Harm wilfully caused in the supervision, control, or conduct of an undercover operation should be explicitly included under §3804(a).

Another important sanction against abuse is immunity from prosecution for any crime that is discussed in an apparently privileged context by an accused with an undercover operative posing as that person's lawyer, or where a privileged discussion between an accused and his or her lawyer is monitored by an undercover agent.

I stress sanctions, of course, because experience has shown that to establish standards without effective sanctions is, at best, a meaningless exercise, and can lull affected people into a false sense of security.

Perhaps the most dangerous omission of coverage in S. 804 relates to the problem of the sham client. I referred earlier to the severely adverse effect of such practices on the lawyer-client relationship of confidence and trust, an effect that I have already observed in various parts of the country. (As lawyers have expressed it, to me, "I have to keep asking myself, 'Is this a real client, or is someone trying to set me up?' ")

Under §3803(a)(4) the "probable cause...necessary" standard must be applied by the Undercover Operations Review Committee before authorizing an operation in which an agent, informant, or cooperating individual poses as an attorney. That standard is not required, however, in the equally serious situation in which the undercover operation involves a sham client. In that event, the lesser standard of "reasonable suspicion" applies, under §3803(a)(1) and (2).

Similarly, under §3803(b)(8) the head of a field office could not bypass the Committee entirely (also using the lesser standard of "reasonable suspicion") where an agent, informant, or cooperating individual is to pose as an attorney; but the head of a field office could act independently and unsupervised in authorizing (on mere "reasonable suspicion") an operation involving a sham client.

Those provisions should be rewritten, therefore, to permit authorization only by the Undercover Operations Review Committee, and to require application of the "probable cause...necessary" standard, in any case involving an approach to a lawyer by a sham client.

Extremely serious, also, is the possibility of infiltration of a law firm by an agent, informant, or cooperating individual taking the role of secretary or other staff member. In my view, that kind of undercover operation is never justifiable, and should be expressly forbidden. (One reason is that confidences of clients who are innocent of wrongdoing would almost certainly be compromised by such an operation.)

Unfortunately, that kind of operation is not forbidden by S. 804. Indeed, infiltration of a law office could be undertaken on "reasonable suspicion," and by the decision of a field office head on his or her sole authority. By contrast, §3803(a)(3) properly requires the "probable cause...necessary" standard for cases involving infiltration of "any political, governmental, religious, or news media organization or entity;" and §3803(b)(1) properly forbids a decision by a field office head alone where the operation "will involve an investigation of possible corrupt action by a public official or political organization, or the activities of the news media."

§3803(b((7) does relate to an undercover employee or cooperating individual who "will attend a meeting between a subject of the investigation and his lawyer." That provision should be broadened, however, to include cases in which the undercover operative will be in a position to overhear discussions between an attorney and client, or to see or hear other privileged information.

More basically, I urge that undercover infiltration of a law office be expressly forbidden. At the very least, §§3803(a)(3) and (b)(1) should be revised to insure that any such operation will be authorized only by the Undercover Operations Review Committee, and on the "probable cause...necessity" standard.

Earlier in my testimony, I referred to the problem of "trading up," that is, the situation in which a prosecutor may offer overwhelming inducements of leniency to one who has just been convicted, to induce him to provide incriminating evidence against his former lawyer. Such evidence is inherently suspect, because of the psychological and other pressures on the former client, and the unconscionable, even coercive, nature of the inducement. In addition, such practices, by sowing mistrust between lawyers and clients, could have an adverse effect, in general, on the lawyer-client relationship of trust and confidence and on the Sixth Amendment right to the effective assistance of counsel.

Accordingly, I recommend that S. 804 provide that neither probable cause nor reasonable suspicion can be established against a lawyer by evidence given by one or more clients or former clients, unless such evidence is corroborated by substantial independent evidence of a reliable kind.

Further, there is a drafting inconsistency that could have substantial (and presumably unintended) effect. Under §§3803(a)(3) and (4) the phrase used is "a Government agent, informant, or cooperating individual...." (Emphasis added) However, under §§3803(b)(2) through (10), the word "informant" is omitted. (Also, in some subsections the phrase "cooperating private individual" (emphasis added) is used instead of "cooperating individual." Presumably, no distinction is intended there either, and the discrepancy should be eliminated.)

More fundamental proposals for revision relate to the serious problems of conflict of interest that are inherent in targeting judges before whom members of the

Department of Justice have appeared, and in targeting lawyers who have been in an adversarial role with the Department. It is essential, as we all know, that justice appear to have been done, as well as that it be done. I think it is bad policy, therefore, to have undercover operations against judges and lawyers initiated and carried out exclusively by members of the Justice Department, especially when there is room for an inference of retaliatory motives.

I have already recommended a judicial warrant requirement. In addition, I would urge that a special prosecutor, independent of the Justice Department, be appointed by a federal judge to supervise any undercover operation directed against a lawyer or judge.

Once again, Mr. Chairman, and members of the Subcommittee, I appreciate your invitation to testify on this important legislation, and thank you for your interest in my views.

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL NO.
80-403

COMMONWEALTH
V.
HARRY N. SHUMAN

MEMORANDUM OF DECISION

Prior to his trial, both this defendant (Shuman) and a co-defendant (Dr. Shwartz) moved for appropriate relief upon the ground that they had been entrapped by public officials. After hearing, this court denied the motion and the matters went to trial, both defendants being convicted. Dr. Shwartz has not appealed but Shuman has and this matter is thus ripe for the entry of a Memorandum of Decision setting forth the facts found during the pre-trial hearing and the legal analysis upon which this court has relied. Commonwealth v. Cook, 351 Mass. 231, 234 (1966) (Kirk, J.).[1/]

During the summer of 1978, information concerning a possible insurance fraud came to the attention of the Major Crimes Unit of the Massachusetts State Police. Proceeding under orders of Captain Robert Enos, State Police troopers obtained two motor vehicles and without the knowledge of the insurance companies involved, insured them under false names. They then staged an accident and another state trooper, privy to the undercover operation but not directly involved in it, filed a false report of accident which stated, "no visible sign of injury but claim of injury by an individual involved." He issued a false citation and a fine was paid pursuant thereto. False accident reports were then filed with the insurance companies by the undercover troopers claiming to have been involved in the accident. The State Police reasonably believe that all this was necessary to lay a credible groundwork to uncover the suspected scheme of insurance fraud.

The undercover troopers went first to Dr. Shwartz. Various inculpatory statements were made by Dr. Shwartz in their presence but they need not be recounted here as this court does not rely upon them in determining the motion with respect to Shuman.[2/]

Following a visit to Dr. Shwartz, the undercover troopers made an appointment with Shuman, an attorney. When they kept the appointment, Shuman introduced himself, took them into a conference room, and asked, "What are the extent of your injuries?" The troopers simply laughed jovially and Shuman joined in the laughter.

One of the undercover troopers said, "Ask Shwartz." Shuman responded, "I'll call him." Shuman proceeded to tell the troopers that it would look better if they did not return to work and, when they agreed to stay at home, he said, "Good. We can add this to the claim."

Shuman then said, "You have to get your medical bills up over $500 to collect" and recommended that the undercover troopers see certain specialists to which he would refer them. Further inquiry as to the injuries of one trooper went like this:

Shuman: "You must have hit your head, right?"

Undercover trooper: "No."

Shuman: "You must have hit your head on the windshield and have terrible headaches."

Undercover trooper: "Oh yes, I remember. If [the specialist to whom you are sending us] is an expert, won't he know?"

Shuman: "He knows how to play the game. You see, hypothetically you're going to see [the specialist] fifteen to twenty times but actually you won't have to go see him."

One month later, in a telephone conversation between one of the undercover troopers and Shuman, Shuman said, "[The other undercover trooper] has gone to the specialist but complained of no injury. He must be straight as an arrow. I'll have to send him to another specialist."

Further, the court finds that each time the undercover troopers were queried by Shuman about their injuries, they laughed in a manner which denoted the absence of any such injuries. The court infers that Shuman, after these conversations, conferred with Dr. Shwartz and took further steps to make claim against the insurance companies for injuries he knew to be nonexistent.

> Entrapment is a defense which may be asserted when a defendant is intentionally induced by the government or its agents into committing all the elements of a criminal offense. United States v. Russell, 411 U.S. 423, 435 (1973). The defense arises only if the criminal conduct was the product of the "creative activity" of law enforcement officers or agents, Sorrells v. United States, 287 U.S. 435, 451 (1932)...[but] no "entrapment exists 'if the accused is ready and willing to commit the crime whenever the opportunity might be afforded,'" Commonwealth v. Miller, 361 Mass. 644, 651 (1972), quoting from United States v. Groessel, 440 F. 2d 602, 605 (5th Cir.), cert. denied, 403 U.S. 933 (1971) [.]

Commonwealth v. Thompson, Mass. Adv. Sh. (1981) 209, 213-214.

The key to the entrapment defense is thus government inducement, more specifically, the employment of persuasion or inducement to create a substantial risk that the offense will be committed by a person other than one who is ready to commit it. Model Penal Code § 2.13(1). Gilbert, Criminal Law, § 223 (1976). Compare State v. Boccelli, 105 Ariz. 495 for the minority view that "reprehensible police conduct" will support an entrapment defense on the theory that the primary purpose of this defense is to control police conduct and the accused's predisposition to commit the crime is therefore immaterial. Here, no such government inducement or persuasion is present. Here there is no evidence of persuasion, importuning, a play on sympathy or other emotion, or any other factor beyond the simple opportunity for criminal gain afforded by the circumstances created by the undercover troopers. Compare:

> Sherman v. United States, 356 U.S. 369, 371 (1958) (defendant only agreed to sell narcotics illegally "after a number of repetitions of the request, predicated on [the informant's] presumed suffering"). Sorrells v. United States, 287 U.S. 435 (1932) (defendant sold whiskey to agent only after repeated requests and pleas based on common loyalty to a military unit). United States v. Borum, 584 F. 2d 424 (D.C. Cir. 1978) (inducement found where undercover agents solicited guns from defendant twenty times).

Commonwealth v. Thompson, supra at 215. Upon these facts, therefore, Massachusetts law will not support the entrapment defense.

Despite the traditional analysis, the defendant here argues strenuously that, as an attorney, it is especially reprehensible to "set him up" and then use against him the statements he made in discharge of his duty to zealously advance the cause of those he reasonably took to be his clients. It's difficult to understand just what legal significance the defendant attaches to this plaint. I take it that he is urging that the statements he made to the undercover troopers be suppressed upon the theory that, in context, it is wrong to "sting" a lawyer and thereby chill the profession's willingness to zealously advocate the client's cause.

While original, this argument is hardly frivolous. Our adversary system is one which sometimes encourages, and at least tolerates, the use of subterfuges to get at the truth. Keeton, Trial Tactics and Methods, 326-327 (2d Ed. 1973). Indeed, nowhere are an attorney's obligations to the truth and his obligations to his clients so sorely tested as in the area of information gathering from clients and witnesses and preparation of their testimony. There is general agreement that "witness preparation for trial purposes is not discovery. This is not the time to learn 'what the case is all about' or to obtain interesting information. Witnesses favorable to your side must be prepared for testifying in court to those facts which will support your theory of the case." Mauet, Fundamentals of Trial Techniques, 11 (1980). A learned and skillful trial lawyer speaks of the need to "horseshed the witness and...brush him up before he testifies. ...Do not hesitate to suggest...more effective answers. You and the witness are going over his testimony to develop that kind of answer. If you shy away from making suggestions, you are not doing your job. ...Press the witness if need be. In extreme cases, put the situation to the witness bluntly." Vetter, Successful Civil Litigation, 280, 284-285 (1978). Others frankly recognize that an attorney has "the opportunity to shape the witness' testimony, often to the point of recreating it in an image closer to that which the lawyer desires than to that which the truth requires.... [P]reparation of one's own witness for trial is hardly, under our adversary system, a public ceremony." Levin & Cramer, Trial Advocacy, 30 (1968). Judges and lawyers alike must admit that the line between "facilitating" communication on the one hand and fabricating evidence or suborning perjury on the other is not well marked.[3/] Perhaps the most careful analyst of this area is Monroe Freedman in Lawyers' Ethics in An Adversary System, 67-69, 71, 74-75 (1975)("There is no conceivable ethical requirement that the lawyer trap the client into a hasty and ill-considered answer before telling him the significance of the question"). See Bellow & Moulton, The Lawyering Process, 247-272 (1978).

Yet even the most expansive and indulgent acquiescence in the norms essential to an adversary system cannot justify Shuman's conduct here. While he may not be faulted for informing his clients of the legal requirements necessary to support their claim, he cannot be excused for expressly suggesting to them the fabrication of medical visits and treatments that were never intended to take place. Any legal system which condoned such conduct by the officers of its courts would not be worthy of the name. Thus, recognizing that the line between propriety and impropriety in attorney-client relationships is difficult and not always clear, Shuman has nevertheless transgressed far beyond the conduct expected of the most zealous but honest advocate.

Accordingly, Shuman's motion was denied.

William G. Young
Justice of the Superior Court

Dated:______________________

FOOTNOTES

1/ This court is not unmindful of the fact that in *Commonwealth v. Collins*, Mass. App. Ct. Adv. Sh. (1981) 29, 33, "the [trial] judge reserved the right to make specific findings 'if necessary or appropriate' at a later time" and the Appeals Court observed "that he should have done so at the time of the *voir dire* or before the end of the trial." While this passage may be read as disapproving the practice followed here, I do not believe it was intended to be construed so broadly. As support for its observation, the Appeals Court relied on *Commonwealth v. Garcia*, Mass. Adv. Sh. (1980) 21, 26 which does not hold that findings and rulings must be made during the course of the trial but simply expresses the need for such documentation prior to the hearing of the appeal. The matter is, however, specifically addressed by Mr. Justice Kirk in *Commonwealth v. Cook*, *supra*, where the Supreme Judicial Court holds that "to require...that the judge file his specific findings simultaneously with his ruling on admissibility, would result in delay in the progress of the trial and the imposition of a needless burden on the trial judge. If a defendant is found not guilty, or, if found guilty, does not appeal, the delay in the trial and the effort of the judge might serve no purpose." It would appear that the Supreme Judicial Court continues to adhere to these views, see *Bruno v. Bruno*, Mass. Adv. Sh. (1981) 1572, 1577 ("[F]indings were made from the bench at the close of the case. Certain matters which might have been dealt with were not mentioned. Although expeditious disposition of contested matters is desirable, there are often situations in which reflection, aided by written requests for findings of fact, is the better course"), and, indeed, the wisdom of the present practice is illustrated by the fact that Dr. Shwartz did not appeal and findings with respect to him would be of no consequence.

2/ It may well be that the statements of Dr. Shwartz are, in fact, the statements of a co-conspirator made during the course of and in furtherance of a conspiracy, which statements are thus admissions upon the part of both co-conspirators. *Commonwealth v. White*, 370 Mass. 703, 708-709 (1976)(Kaplan, J.). This court need not decide the point as part of a ruling upon a pre-trial motion, however, since the ruling as respects Shuman will stand upon a consideration of his own admissions taken separately.

3/ Indeed, our present rule governing the conduct of an attorney in a criminal case who learns that his client intends to testify falsely, DF 13(b) of Supreme Judicial Court Rule 3:08 (formerly Rule 3:22A), is a candid compromise between the extremes on either side ...[of a] controversy [which] is not one capable of solution by any formula which will be satisfactory to all disputants." Statement of Quirico, J. concerning SJC Rule 3:22A published with the Rule, pp. 5-6 (February 14, 1979).

Senator MATHIAS. Thank you for being here and for your very helpful and specific suggestions.

Mr. SEIGENTHALER. Mr. Chairman, I have a prepared statement which I would appreciate having included in the record, and I will present an abbreviate version of it.

Senator MATHIAS. It will be included in the record.

STATEMENT OF JOHN SEIGENTHALER

Mr. SEIGENTHALER. I appreciate, Mr. Chairman, you and members of the committee providing the Society of Professional Journalists, Sigma Delta Chi; the American Society of Newspaper Editors and the American Newspaper Publishers Association the opportunity to comment on this bill which we believe would establish the dangerous and disasterous precedent of allowing Government Agents to infiltrate the news media and co-opt its fundamental independence.

My name is John Seigenthaler, and I have with Mr. Bruce Sanford from Baker and Hostetler. He is the first amendment counsel to the Society of Professional Journalists, Sigma Delta Chi.

I am the editorial director of USA Today and the editor and publisher of the Tennessean out of Nashville. I am here as a long-time member of the Society of Professional Journalists. I am a member of the board of directors of the American Society of Newspaper Editors and a long-time member of the American Newspaper Publishers Association.

I speak from 36 years experience as a journalist and experience also in the Justice Department as Administrative Assistant to former Attorney General Kennedy.

Let me briefly outline the three organizations I represent. The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, nonprofit organization representing 24,000 members in print and broadcast news. It is the largest organization of journalists in the country.

The American Newspaper Publishers Association is an organization that has membership of 1,400 newspapers accounting for about 90 percent of the U.S. daily and Sunday circulation and many nondaily papers.

And the American Society of Newspaper Editors is an organization that has 900 directing editors of newspapers, and the purpose of that organization includes the ongoing duty of improving the manner in which journalism, through the profession, carries out its responsibilities in providing an unfettered, effective press in the service of the American people.

These three groups, Mr. Chairman, not always are in complete agreement with each other, and its members are never in total agreement, but all three organizations have long opposed the impersonation of reports by Government agents and have opposed as well any formal relationship between an investigative branch of the Government and the news media, be it in the form of S. 804 or the FBI charter which Congress rejected 5 years ago.

While we oppose the provisions of S. 804, I would like to express contragulations to the Chair and the members of the committee for focusing the debate on this troublesome issue.

While the overall purposes of the proposed bill regulating Department of Justice undercover operations and providing an affirmative statutory defense for entrapment are viewed by many of us as laudable, the provisions affecting the media are not.

Today, Mr. Chairman, I am here to oppose those provisions which would establish a standard justification under them which the department and subagencies could infiltrate the news media.

The bill's proposed statutory sanctification of what we consider an illicit procedure under which a Government agent could infiltrate a news organization or pose as a member of the news media is precisely the sort of provision that would whittle away and erode first amendment freedoms guaranteed by the Constitution.

The foundation upon which the free and vibrant press is built is its independence and without an unfettered press, the public would be far less able to make informed political, social, and economic choices.

By establishing a standard, this proposal presents an implied endorsement of Government infiltration of new organizations and of agents masquerading as reports. Such a measure would blur the strict separation that has and, indeed, must exist between the press and the Government and could only corrode that foundation of independence.

The core of our argument is that the independence of the press must be maintained if the press is to keep its credibility and fulfill its responsibility to inform the citizenry.

The formalization of the relationship between the news media and the primary investigative agency of the Federal Government would encroach upon press independence. The autonomy of the press in a free and democratic society would be directly and immediately threatened by the language of S. 804.

Passage would severely damage the public's ability to perceive the news media as independent, objective seekers and disseminators of news. If the Government infiltrates a new organization or impersonates journalists, the organization or the journalist would become the unwitting partner of the Government, and once the news media becomes perceived as less than independent, its vital role in the democracy is weakened.

If the public comes to question the independence of its source of news, to wonder if news reports are Government propaganda, then our record as a free and open society that encourages free and open debate is blemished.

Enactment of S. 804, Mr. Chairman, would taint every news person with the tar of suspicion and cause the public to wonder who is the journalist and who the Government agent. This would provide a substantial bar to the journalist in the role of freely gathering the news.

Since the citizenry is the final arbiter of the proper conduct of public business, the information it receives must not be tainted. We wonder, Mr. Chairman, at the derivation of S. 804's provisions concerning the press. We wonder if perhaps there is at present some infiltration or impersonation now prevalent. We wonder where the proposal came from and feel that we deserve to know if the Department of Justice now is engaged in such activity and under what authority.

The so-called protections in S. 804 which are an attempt to insure that the new law will not lead to abuses are, in our judgment, not adequate to protect an independent news media. Once infiltration and impersonation are legitimized, the principle of an independent news media is lost and the damage done cannot be recovered.

In conclusion, Mr. Chairman, we urge the committee and the full Senate to reject an unwise and unneeded provision that would disastrously interfere with the independence of the press so essential to our form of government.

Once again, I appreciate the opportunity to be here.

[The prepared statement of Mr. Seigenthaler follows:]

PREPARED STATEMENT OF JOHN SEIGENTHALER

Thank you, Mr. Chairman and members of the committee for providing the Society of Professional Journalists, Sigma Delta Chi, the American Society of Newspaper Editors and the American Newspaper Publishers Association the opportunity to comment on this bill which would establish the disasterous precedent of allowing government agents to infiltrate and co-opt the fundamental independence of the news media.

My name is John Seigenthaler. Accompanying me is Bruce W. Sanford of Baker & Hostetler, the First Amendment Counsel to SPJ, SDX. I am the Editorial Director of USA Today as well as editor and publisher of The Tennessean in Nashville. I appear today as a long-time member of the Society and a member of the board of directors of the American Society of Newspaper Editors. My views reflect both my 35 years as a journalist and my experience working in the Department of Justice as an assistant to the attorney general.

The Society, formed in 1909, is a voluntary, nonprofit organization. It is the largest organization of journalists in the United States and represents the views of some 24,000 members in both print and broadcast journalism.

The American Newspaper Publishers Association is a nonprofit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of nearly 1400 newspapers accounting for more than 90 percent of U.S. daily and Sunday circulation. Many non-daily newspapers also are members.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 900 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include the ongoing duty of improving the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

These three groups have long opposed the impersonation of reporters by government agents as well as any formal relationship between an investigative branch of the government and the news media, be it in the form of S. 804 or the FBI Charter which the Congress rejected five years ago. While we oppose these provisions of S. 804, you and the members of this committee are to be praised for focusing debate on this troublesome issue.

The overall purpose of S. 804 -- regulating Department of Justice undercover operations and providing an affirmative statutory defense for entrapment -- may be laudable. But the provisions affecting the media [§§ 3803(3) & (4)] are not. The Society appears before this committee today, Mr. Chairman, to oppose the provisions of S. 804 which would establish a "standard of justification" under which the Department of Justice and its subagencies could infiltrate the news media. Let me say at the outset that the bill's statutory sanctification of a procedure under which a government agent can "infiltrate" a news organization or "pose as a . . . member of the news media" to "detect or to prevent specific acts of criminality" is precisely the sort of law that whittles away at the First Amendment freedoms of the Constitution.

The foundation upon which a free and vibrant press is built is its independence. Without an unfettered press, the public would be far less able to make informed political, social and economic choices. By establishing a standard, S. 804 presents an implied endorsement of governmental infiltration of news organizations and of agents masquerading as reporters. Such a measure, which blurs the strict separation that must exist between press and government, can only corrode that foundation of independence. The core of our argument today, Mr. Chairman, is that the independence of the press must be maintained if the press is to fulfill its responsibility of objectively informing the citizenry.

As the Supreme Court of the United States said in Roth v. United States, 354 U.S. 476, 488 (1957):

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensible to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

There can be no doubt that the formalization of the relationship between the news media and the primary investigative agency of the federal government is encroachment upon the independence of the press. The autonomy of the press in a free and democratic society is directly and immediately threatened by the proposals embodied in S. 804.

Passage of S. 804 in its present form would severely damage the public's ability to perceive the news media as objective seekers and disseminators of news. If the government infiltrates a news organization or impersonates a reporter, then that organization or reporter is the unwitting partner of the government. Once the news media becomes known as anything less than an independent chronicler of news and events, its vital role in the democracy is weakened. The appearance of partisanship implicit in S.804 is inconsistant with independence. If the public comes to question the veracity and objectivity of information and ideas -- to wonder if news reports are "government propaganda" -- then the free exchange of information and the debate over ideas that is our trademark as a nation fades.

Furthermore, enactment of S. 804 will taint every newsperson, no matter what his or her assignment, with suspicion. The public may well come to wonder if the reporter writing the story is doing so as a journalist or as a government agent. This can lead to unacceptable impediments to the news media's job of freely gathering news. Since the citizenry is the final arbitrator of the proper conduct of public business, the information it receives must be of impeccable objectivity.

We must also question, Mr. Chairman, the derivation of S. 804's provisions concerning the press. We have seen no justification for establishing these "protections" for the news media. Is this infiltration and impersonation so prevalent now that the drafters of this legislation feel these protections are needed? If so, we would like the facts. We would like to know how often this has been done in the past and if the Justice Department is doing it at present and, if so, under what authority.

Let me address briefly the "protections" inserted in S. 804 in an attempt to ensure that the new law will not lead to abuses. Simply put, these protections -- needing to show "probable cause" of specific criminality, the creation of a review committee to monitor operations, the requirements to guard against the violation of confidential relationships -- are not enough. Once infiltration and impersonation are legitimized, the principle of independence for the news media is lost, the damage done. These bureaucratic guidelines do not assuage us.

In conclusion, Mr. Chairman, we urge your committee and the full Senate to reject the unwise and unneeded provisions of S. 804 that would disastrously interfere with the independence and objectivity of the press so essential to our form of government.

Senator MATHIAS. Thank you, Mr. Seigenthaler.

I do regret having had to ask the three of you to wait so long. On the other hand it may be that the wait was not totally without some redeeming social value because you had an opportunity to listen to the testimony of the Department of Justice and you had an opportunity to hear some of the views of my colleagues on the committee. So you will understand that in proposing even what Jim Neal called this modest step, that we are paddling against a very strong current.

If Mr. Seigenthaler has been wondering what has been going on, you may wonder even a little more after Mr. Jensen's testimony.

Mr. SEIGENTHALER. Indeed. I found the suggestion that—I should say I found it as an individual citizen and as an individual editor and publisher, I found the suggestion, that the threshold is too high, interesting and disturbing.

Senator MATHIAS. Of course, that raises the question that I tried to get started with the Justice witnesses which is what is the current situation. Is there anything, to your knowledge, that now prevents the FBI from sending out an agent to pose as a reporter or as a journalist? This might be done either as a part of an investigation of alleged criminal activity within the news organization, or perhaps with regard to some third party unrelated to any news organization. It could be done just to acquire information from someone who might be less guarded in talking to a reporter than he or she would be in talking to a known police agent.

Mr. SEIGENTHALER. No; I was encouraged to hear Judge Webster's response in which he declared that that was not the case, that he did not know of any instance in which it was the case.

I have no knowledge of any current efforts in that regard. It is my impression that it has occurred in the past, and there is at least one case several years old that I know and worry a good deal about, but insofar as I know, at present there is not anything to stand in the way of that sort of decision except, I suppose, a law enforcement concern that it would offend the basic value.

Senator MATHIAS. Well, under those circumstances, would not even the modest provisions of S. 804 tend to strengthen the effort of the press to maintain a separation between the news media and Government?

Mr. SEIGENTHALER. Senator, my impression at the present is that most law enforcement agencies consider the first amendment guarantee a barrier. Perhaps it is a public relations barrier more than a legal barrier, but my impression is that the barrier is there.

To codify it would give me grave concern. I think that it would encourage not deter not only agents of the FBI but law enforcement agencies at the State level and at the local level, would encourage them to take steps that they at least do not now acknowledge taking.

It would seem to me that to give by law an invitation to the Attorney General to call together a group of advisers and evaluate the propriety of doing this would be dangerous and beyond would be more dangerous with some Attorneys General than others, but beyond that it would also, it seems to me, open the door on other Federal agencies and local police agencies to follow suit.

I would prefer to fight the possibility of that in public debate and perhaps even litigate it if necessary rather than have Congress, in effect, by statute invite them to come in.

Senator MATHIAS. Put your trust in the unwritten law.

Mr. SEIGENTHALER. Well, I guess it finds its basis in the first amendment.

Mr. FREEDMAN. With all respect, it does seem to me that codification with no sanctions whatsoever is not going to be any improvement over guidelines that can be followed if the executive department chooses to do so or not.

As I noted before, this bill does not provide for any realistic sanctions. None whatsoever that relate to abuse of discretion in initiating these operations and in targeting particular individuals.

Senator MATHIAS. But let me ask you this, Professor Freedman. Is there any inhibition in the present state of the law against an agent impersonating a lawyer? Maybe this is a confession that I would prefer not to make, but is there anything in S. 804 that will strengthen or weaken the expectation that a client now has that the lawyer he is talking to is really his lawyer and not an agent or that the lawyer speaking to the client can have the expectation that there is a bona fide client out there?

Mr. FREEDMAN. Mr. Chairman, under the law as it is now, it seems to me that a criminal defendant would have a strong due process argument, sixth amendment argument, for dismissal of any charges if the defendant finds that he or she has been dealing with a sham lawyer.

When you have Congress saying in so many words that it shall not be a defense, as this bill appears to do, I think you leave that client who has been dealing with a sham lawyer in a worse rather than a better position.

If I had to litigate it, I would rather litigate it directly under the Constitution without this kind of help, than to be faced with the argument that the Congress agrees with the executive that there should be no defense to the defendant in such a circumstance.

Senator MATHIAS. Let me follow up with Professor Freedman. Is there any evidence that law enforcement agencies are actually using some of these tactics that you are worried about?

Mr. FREEDMAN. Yes; attached to my testimony, for example, is one case from Massachusetts, the Commonwealth against Shuman, in which sham clients were sent to a lawyer in order to gather evidence against the lawyer.

In the context of that case, as I note in my testimony, I have no objection to that. I think that the integrity of the administration of justice is of sufficient importance that some undercover operations are necessary, even directed against judges and lawyers, but, Mr. Chairman, not without adequate safeguards, and particularly with regard to judges and lawyers, that most sensitive area, there is a gap in this proposed legislation. That is, there are highly desirable provisions, in my view, relating to operations directed against news media, against political organizations, and against religious organizations, that do not cover infiltration of a law office, for example, by having an undercover agent pose as a secretary or a paralegal, and the sham client situation.

Senator **Mathias**. Now, Mr. Berman, you have suggested that we not intrude upon privileged relationships at all.

Mr. **Berman**. I believe that in my testimony a year and a half ago and again today, I stated there should be no intrusion by an undercover agent into a confidential relation. I believe it violates the Constitution straight out.

However, I would like to speak both to Mr. Seigenthaler and to Monroe here, in the sense of what Congress was doing, I think, when this section was drafted and when the report was drafted with recommendations.

Right now the undercover operation guidelines of the FBI and their criminal investigative guidelines do not prohibit and in fact do authorize the infiltration of press, media, and other organizations, do provide that with the Director's signature and no standard whatsoever that they can pose as an attorney, a physician, clergyman, and so forth.

I think it is important because when we have the abuses of the intelligence agencies, for example, in the early 1970's, it was a possibility for Congress to call them abuses because there were no guidelines whatsoever. There was no admission by the executive over a long course of time what their practices were.

Here Congress since 1980 at least has known that every year they are authorizing money for undercover operations and appropriating money to the FBI and to the Justice Department with these explicit authorities in there.

While Congress has not sanctioned by passing a statute with limitations or no limitations, Congress, I believe, is acquiescing and would be estopped from saying that it was not aware that this practice was going on.

The Government would be able to use that as part of its defense to any case that it was violating due process even where there is no statute. I am not saying that these provisions could not be drafted more carefully, more strictly and, in fact, in some cases turned into outright prohibitions.

But I think that the intent of the committee was to recognize that the authority exists—at least the executive is claiming it. Congress appropriates money for it, and I think it would survive a due process challenge.

I mentioned from Mr. Freedman's point of view that if you want to talk about a case involving the judicial process he should read the record, and he probably has, of Operation Graylord in Chicago.

Mr. **Freedman**. I am familir with that.

Mr. **Berman**. There they are posing as lawyers, posing as attorneys, posing as clients, and posing as prosecutors—they are playing all the roles of the legal system, and I think to the detriment of the legal system.

But I still would be very surprised, given my reading of the Abscam cases, whether they would be found in violation of due process for using those techniques.

Senator **Mathias**. Let me ask Mr. Seigenthaler and Professor Freedman. Would a warrant make you feel any better?

Mr. **Seigenthaler**. With regard to the press, it would not make me feel any better. Well, if I had to choose between no warrant and a warrant, Senator, I would take a warrant.

Senator **Mathias**. It does not dispell your basic concern?

Mr. **Seigenthaler**. Would not in the least. My own strong feeling is that the language in the guidelines remains language in the existing guidelines and we have not had in any case we know of any effort to use the language in those guidelines or infiltrate or impersonate.

As I said, I was reassured by what Judge Webster said this morning. I would prefer to fight the guidelines in their present form as opposed to having to deal with the statute, that, in effect, would give the force of law to the right to infiltrate or impersonate.

So the answer is I guess if backed into a wall and the dicotomy where either/or I would prefer a magistrate to a representative of the Justice Department having what was described this morning as a high level conference on the subject.

But I would prefer to leave it as it is in the hope that the Director and his successors and those who work under him in the Bureau and its subagencies would recognize the offense to first amendment rights and an independent press once they begin to walk across the line with the language.

Mr. **Freedman**. Mr. Chairman, I would not find a warrant to be the solution to the problems that I have identified, but it certainly is not going to hurt. What concerns me is legislation that says, in section 3803(e), "failure to comply with the provisions of this section shall not provide a defense in any criminal prosecution or create any civil claim for relief."

Then in section 3804(a), "no action may be brought under this section for injury caused by operational or management decisions relating to the conduct of the undercover operation."

Again, we are talking about what Justice Jackson referred to as "the most dangerous power" that the prosecutor wields, and here it remains totally unfettered, and again, if we are talking about actions against judges or lawyers, in the clearest kind of conflict of interest situation.

Now, it may be that there will be a conflict of interest if a prosecutor targets a newspaper or a television announcer or commentator who has criticized the prosecutor. I am not suggesting that the only conflict of interest relates to judges before whom the prosecutor has appeared or defense lawyers whom the prosecutor has opposed in an adverserial role.

But those are certainly of extreme sensitivity, and a warrant is going to help, but the other safeguards that I suggest, including the appointment of a special prosecutor by the judiciary, I think, would go a lot further toward resolving the kinds of problems that I have.

Senator **Mathias**. God forbid that I discourage creating business for lawyers. I may have to earn an honest living some day. [Laughter.] But what you are proposing is judicial enforcement of the standards, and that is going to lead to a plethora of motions to suppress evidence and all of that kind of activity.

Mr. **Freedman**. That is what we call due process, Mr. Chairman. It is not expeditious. Due process has never been praised for its expeditiousness.

Senator **Mathias**. Well, that is a forthright answer.

Mr. Berman has made an appeal for a consensus, one that I appreciate. I suppose the classic case of consensus was the choice of Spiro Agnew as Vice President.

Mr. **Berman**. Thank you very much, Senator, for your vote of confidence in the consensus that I have fashioned here.

Senator **Mathias**. Well, that boiled down to a choice of a candidate who had the least enemies at the time of the choice.

Mr. **Berman**. Well, there may be a hidden trap in putting even these standards into law, but I do not think so. I really think that trying to enforce the reasonable suspicion standard is the least that we should be doing in this area, and if we can take the Sensenbrenners and Congressman Edwards and Senator Mathias and Senator Simpson and form a coalition around that position, expansion of that position, the expansion of the review board and the implementation of the reasonable suspicion standards, that is certainly light years away from where we are where the Bureau has the discretion to ignore that standard whenever they choose.

I think that there are lots of problems involved. I agree with Mr. Seigenthaler. It is not clear, and with Monroe, how to—whether it is better or worse—to try to put stronger limitations on some of these practices which probably should be prohibited.

But certainly the administration will go to the mat believing that these are limitations that they do not want, and it will doom any chance of doing anything at all.

Senator **Mathias**. I think we have to keep in mind the case you mentioned, the North Carolina case, in which voters could go to the polls in an election that is solely the product of Government deception.

Mr. **Berman**. I tried to sneak into my modest proposal a couple of prohibitions. I do not think that you can, in an undercover capacity enter into a confidential relationship protected under law. It is a violation of the lawyer/client test. I believe that is a violation of due process under the Constitution.

Senator **Mathias**. What you are saying is there are some fundamental societal values that cannot be interfered with.

Mr. **Berman**. Absolutely. We recognize those relationships in other areas of the law whether it is source, shield laws or whatever. That prohibition ought to be excepted, and I would not like to be the Senator on the floor saying we should not respect those relationships.

Another is that you should not interfere with the political and judicial process, and I think that is what happened in Graylord potentially when all the facts come out. It happened in Cleveland, and the operation of buying election and influencing an election result in North Carolina is totally unacceptable.

We need the line from the CIA executive order which says that to the extent they are conducting covert operations in the United States it should be designed so as not to interfere with or effect the political process.

Senator **Mathias**. Maybe that is a good point at which to end our discussion today. This last panel has been worth waiting for. It has been very enlightening to me. I think it has brought some fresh concepts to this discussion. I am very grateful to all of you.

The committee stands in recess subject to the call of the Chair.

[Whereupon, at 4:05 p.m., the subcommittee adjourned at the call of the Chair.]

APPENDIX

PART 1.—ADDITIONAL STATEMENTS AND VIEWS

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May 23, 1983

Senator Charles McC. Mathias, Jr.
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Mathias:

Thank you for soliciting my views on S. 804. My comments are divided into three general sections. Section I examines undercover operations from a policy perspective. Section II examines the decisions of the United States Supeme Court relating to undercover operations and the fourth amendment. Section III focuses directly on S. 804. Sections I and II are derived from my testimony in February 1981 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary during its Hearings on FBI Oversight.

I should note at the outset that S. 804 is an important contribution. Subject to a few minor suggestions, I strongly endorse its enactment.

I. Undercover Operations and Legitimate Expectations of Privacy

The use of spies, secret agents, and informers to elicit information from unsuspecting individuals and to "invite" such individuals to engage in unlawful conduct can be an extraordinarily effective investigative technique. Undercover operations may enable government investigators to infiltrate the inner-most circles of organized crime and to discern otherwise difficult to detect patterns of "consensual" unlawful behavior. Moreover, such operations frequently enable the government to present its evidence in subsequent criminal prosecutions in an unusually reliable form--through the direct testimony of law enforcement officers who have participated personally in the unlawful conduct, and often through video and oral tapes of the actual criminal transactions. Finally, the widespread use of spies, secret agents, and informers can effectively generate an atmosphere of distrust and suspicion among potential "targets." By rendering such individuals uncertain as to the actual status of their cohorts, the very existence of undercover operations can have a potent deterrent effect.

There is, however, another side of the coin. For despite their special utility--indeed, largely because of their special utility--undercover operations pose special dangers to the individual, the government, and to society in general. These dangers are not unfamiliar. Such operations, for example, may "create" crime; they may require government agents to participate directly in illegal activity; they may unfairly entrap unwary individuals into unlawful conduct; they may damage the reputations of innocent persons; and they may seriously undermine legitimate expectations of privacy. Although each of these dangers merits careful scrutiny, I will focus my own comments on the potential conflict between undercover operations and personal privacy. To what extent, if any, does the government's use of spies, secret agents, and informers significantly endanger legitimate expectations of privacy? To what extent, if any, should undercover operations be restricted in order to preserve such expectations?

In approaching these questions, it is essential to note at the outset that the "undercover operation" is not a unitary phenomenon. It is, rather, multifaceted in nature, embracing an almost limitless variety of situations . It emcompasses the creation of an unlawful business establishment to attract "customers" seeking to engage in illegal transactions, and the infiltration of a drug-smuggling conspiracy by a professional agent; it encompasses the approach of a suspected prostitute by a plainclothes officer on the street, and the activities of an informer who joins the ranks of a political or community organization in the course of a domestic security investigation. The undercover operation may last a moment, or it may extend over many months. It may involve only a single agent, cooperating citizen, or paid informant, or it may involve a complex network of undercover operatives. The extent to which any particular operation intrudes upon legitimate expectations of privacy will necessarily vary according to the circumstances.

With that caveat in mind, I would like to turn directly to the privacy issue. In assessing the nature of the potential intrusion on legitimate expectations of privacy, it may be helpful to hypothesize a paradigm situation--one posing a not uncommon set of circumstances. Let us suppose that an agent seeks to investigate an individual suspected of complicity in labor racketeering, narcotics smuggling, or political curruption. The goal may be to deceive the "target" individual into revealing desired information, to lead the agent to "higher-ups" in a suspected conspiracy, or to induce the target to engage in a criminal transaction with the agent himself.

Whatever the ultimate goal, the target in most circumstances is highly unlikely to disclose his criminal proclivities, if any, to just any stranger off the street. In all probability, the agent, to be effective, will need to initiate and gradually foster a relationship with the target in which the target will come eventually to trust and to confide in the agent. In short, the agent must win the target's confidence through deception, a task that may require weeks or even months to accomplish. To hasten this process, the agent may seek the cooperation of some person already in a trust relationship with the target--perhaps a friend, a business acquaintance, or even someone in a confidential relationship with the target. To secure this cooperation, the agent may appeal to civic duty, offer monetary compensation, or perhaps offer some other inducement.

Whether the agent acts on his own or secures the assistance of a private citizen, the undercover operation in our hypothetical investigation is likely seriously to intrude upon the target individual's legitimate expectations of privacy. Indeed, the intrusion occasioned by such operations is strikingly similar to and perhaps even greater than that ordinarily associated with other investigative techniques--techniques that may lawfully be employed only when there is a prior judicial finding of probable cause. Consider, for example, such practices as wiretapping, third-party electronic bugging, and eavesdropping. No less than these other practices, the use of spies, secret agents, and informers directly undermines conversational privacy. In the wiretapping, electronic bugging, and eavesdropping context, government officals surreptitiously monitor the individual's conversations. In the undercover context, government officials deceitfully participate in and overhear those very same conversations. The intrusion upon conversational privacy is functionally the same. As in the case of wiretapping and electronic bugging, the undercover operative will inevitably learn not only about the target individual's criminal intentions, if any, but also about his personal, political, religious, and cultural attitudes and beliefs--matters which are, quite simply, none of the government's business.

Moreover, unlike wiretaps and bugging devices, spies and informers see as well as hear. If, in the course of an investigation, government officials want to search an individual's home or office or inspect his documents, letters, or other personal effects, they ordinarily would be required first to obtain a judicial warrant based upon probable cause. In the undercover context, however, the undercover operative may in the course of the investigation be "invited" to enter the target's home or office or to examine his private papers or effects. The undercover operation, if not carefully controlled, would thus have the anomalous effect of enabling government to invade the individual's privacy through deceit and stratagem when it could not otherwise lawfully do so.

Finally, there is a special social cost associated with the use of spies, secret agents, and informers. As noted earlier, the use of undercover opeartives can effectively deter criminal conduct by creating doubt and suspicion as to the trustworthiness of the would-be criminal's colleagues and associates. If the use of such operatives is not carefully confined, however, and law-abiding citizens are not reasonably confident that they will not find themselves dealing inadvertently with spies and informers, then this chilling effect can all too easily spill over into completely lawful conversations and relationships. The unrestrained use of such operatives, in other words, has at least the potential to undermine that sense of trust that is essential to the very existence of productive social, business, political, and personal--as well as criminal--relations.

Despite these concerns, no one would sensibly suggest that the government be prohibited absolutely from engaging in undercover investigations. Rather, what is needed is a reasonable accommodation of the competing investigative and privacy interests. In attempting to define such an accommodation, two related bodies of law should be considered--the Supreme Court's analysis of these issues from the perspective of the fourth amendment, and the restrictions proposed in S. 804.

II. Undercover Operations and the Fourth Amendment

The Supreme Court has consistently held that the use of deceit by spies, secret agents, and informers to elicit information from unsuspecting individuals does not in itself constitute a "search" within the meaning of the fourth amendment. See e.g., United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1951). In part, this is the result of historical circumstance. The language and historical background of the amendment make clear that its framers did not affirmatively intend to bring undercover investigations within the amendment's scope. Although the use of spies and informers was not wholly unknown to the framers, the practice simply was not on their minds at the itme. In some contexts, the Court has been willing to look beyond the precise intent of the framers and to construe the amendment expansively. This has been the case, for instance, with respect to wiretapping and electronic bugging, see Katz v. United States, 389 U.S. 347 (1967). The Court has declined, however, to extend the amendment's protections to undercover operations as well.

In large part, the Court has attempted to justify this distinction on the theory that the risk of being betrayed by one's supposed friends and confidants is "inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." Hoffa v. United States, supra, at 303. And, the theory goes, since this "is not an undue risk to ask persons to assume," the fourth amendment does not protect the individual's misplaced confidence that a person to whom he discloses information will not later reveal it. Lopez v. Untied States, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting). With all due respect, this theory is unsatisfactory whether as a matter of constitutional law or as a matter of policy.

It is true, of course, that in the ordinary course of our relationships we necessarily assume the risk that our friends and associates will betray our confidences. Insofar as such persons act solely in their private capacities, and not in cooperation with government officials, their betrayals undoubtedly fall beyond the scope of the amendment's concern. The analysis shifts markedly, however, once government enters the picture. For the risk that the individual's confidant may be fickle or a gossip is of an entirely different order from the risk that he is in reality an undercover agent commissioned in advance to report the individual's every utterance to the authorities. In the latter situation, we are no longer dealing with a risk of misplaced confidence inherent in the nature of human relationships; we are dealing instead instead with government action designed explicitly to invade our privacy and to end in deceit and betrayal--with government action that appreciably alters the nature of the risks we ordinarily expect to assume. The notion that our willingness to assume one risk means that we must necessarily assume the other is doubtful at best.

Indeed, from a constitutional standpoint, we necessarily assume the risk that private citizens will invade our privacy by tapping our telephones, bugging our office and ransacking our homes. It has never been suggested, however, that because those risks are unprotected by the fourth amendment we must also assume the risk that government agents will engage in similar conduct or induce others to do so for them. There is simply no logical reason to assume that the risk of undercover surveillance is any more "inherent" in our society than the risk that government officers will tap our telephones, bug our offices, or ransack our dwellings.

Another theory occasionally voiced in defense of the Court's distinction between wiretapping and electronic bugging, on the one hand, and undercover operations, on the other, is that the risk of being deceived by a secret agent or informant is not an unreasonable one to require individuals to assume because "it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted." Lopez v. United States, supra, at 450 (Brennan J., dissenting). The idea that individuals exercising only reasonable caution can readily avoid involvement with spies and informers underestimates the skills of government agents and presupposes an unrealistic ability on the part of ordinary citizens to detect deception. In the usual course of our relationships, we do of course make judgments as to the trustworthiness, discretion, and loyalty of our acquaintances. The types of judgments we are asked to make in the secret agent context, however, are entirely different from those we ordinarily expect to make. The individual who is confronted with the possibility that his supposed friends and associates are in reality undercover operatives must attempt to assess not only their loyalty as persons, but also the likelihood that they are skilled professional dissemblers specially trained in the art of deception, or that, at some unknown level of monetary or other inducement, they would agree to "sell" that loyalty to the authorities. That most individuals are not in fact especially adept at making these sorts of determinations is demonstrated by the very effectiveness of undercover investigations generally. In any event, one would think that this particular skill is not one that citizens of a free society should ordinarily have to acquire. (For a fuller explication of the Court's fourth amendment analysis, see generally Stone, The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers, 1976 American Bar Foundation Research Journal 1193).

Whatever the merits of the Court's approach in the fourth amendment context, it is not dispositive here. The Court has held only that undercover operations do not in themselves constitute "searches" within the meaning of the fourth amendment. The Constitution, however, establishes only a minimum protection of only limited types of privacy interests, and Congress has frequently enacted legislative safeguards of privacy beyond those found by the Court to be mandated by the Constitution. See, e.g., Communications Act of 1934, § 605 (48 Stat. 1103); Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.). The critical question--the question that must ultimately be answered by Congress--is whether and to what extent law-abiding citizens in a free society should be entitled confidently to assume that their supposed friends, confidants, lawyers, and other associatess are in fact what they appear to be, and are not in reality clandestine agents of government secretly reporting their activities and conversations to the authorities.

III. S. 804

S. 804 is a comprehensive and commendable attempt to come to grips with a wide-range of problems associated with the use of undercover operations. Most important, S. 804 adopts a set of threshold requirements for the initiation of undercover investigations. In this sense, it modifies, and improves on, the existing Justice Department Guidelines.

I offer the following observations:

(1) Section 3803(a)(1) adopts a "reasonable suspicion" standard when "the operation is intended to obtain information about an identified individual." The "reasonable suspicion" standard serves several valuable functions--it strikes an appropriate balance between competing investigative and privacy

concerns; it restricts the use of these investigative practices to a defined set of circumstances, thereby generating confidence among law-abiding citizens that they will not unreasonably or indiscriminately be subjected to such practices; and it requires a conscious governmental determination in advance that the proposed intrusion upon individual privacy is reasonably justified in the particular situation at issue. At the same time, however, § 3803(a)(1) reflects the fact that the traditional "probable cause" standard might be too restrictive of legitimate law enforcement needs if imposed on all undercover operations. It thus adopts the more flexible "reasonable suspicion" standard, reserving the "probable cause" requirement for the more sensitive circumstances delineated in §§ 3803(a)(3) and (4).

(2) Section 3803(a)(2) authorizes undercover operations that are not directed at identified individuals when there "is reasonable suspicion that the operation will detect past, ongoing, or planned criminal activity." There is a difficulty here. Consider the use of undercover agents to offer bribes to government inspectors. Is this "operation" governed by § 3803(a)(1), in which case there must be "reasonable suspicion" that each target individual "has engaged, is engaging, or is likely to engage in criminal activity"? Or is it governed by § 3803(a)(2), in which case there need be "reasonable suspicion" only that "the operation will detect past, ongoing, or planned criminal activity"? In other words, if the operation is governed by § 3803(a)(2), it is lawful if there is "reasonable suspicion" that even one of perhaps one hundred inspectors might accept the bribe. This is perverse, for under view, the larger the class of persons subjected to the operation, the greater the likelihood that there will be "reasonable suspicion that the operation will detect" criminal activity.

There are at least two possible ways to escape this dilemma. First, one might simply eliminate § 3803(a)(2) and delete from § 3803(a)(1) the word "identified." Second, one might add to § 3803(a)(2) an additional requirement that there be a finding that the law enforcement benefit derived from the operation is likely substantially to outweigh the cumulative intrusion on privacy. This would retain the flexibility of the existing provision, without opening the door to wide-ranging and never-ending operations. At the same time, however, it would add an additional level of uncertainty to the scheme. My own preference is for the first alternative.

(3) Sections 3803(a)(3) and (4) adopt a "probable cause" requirement when an operation involves infiltration of a "political, governmental, religious, or news media organization" or involves an agent "posing as an attorney, physician, clergyman, or member of the news media." This is a sensible requirement, for it elevates the threshold standard in those circumstances in which the intrusion on privacy is most serious. My only suggestion is that the phrase "is or" be inserted in § 3803(a)(4) after the words "or cooperating individual."

(4) Section 3803(b) allocates decisionmaking authority between the Undercover Operations Review Committee and the head of the local field office. In effect, it requires a decision by the Undercover Operations Review Committee in situations involving special problems. Although one might quibble about the categories, § 3803(b) strikes a reasonable balance between local and centralized decisionmaking. Although the scheme might seem too complex to work, the existing Justice Department Guidelines adopt a similar format. If the current Guidelines are workable, § 3803(b) should work as well.

(5) S. 804 does not require a judicial warrant. This is unfortunate. The reasons for involving the judiciary in the investigative process are familiar. They are also compelling. I would require a judicial warrant at the very least in the situations governed by §§ 3803(a)(3) and (4). There is no valid reason for insulating undercover operations, unlike wiretaps and conventional searches, from judicial scrutiny.

If I can be of any further assistance in this matter, please feel free to call on me at any time.

Sincerely yours,

Geoffrey R. Stone
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GRS:SCG

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May 31, 1984

Honorable Charles McC. Mathias, Jr.
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Mathias:

Thank you for inviting me to comment on S. 804, the Undercover Operations Act of 1983. I have studied the Bill and read the Final Report of the Select Committee that you chaired, and I am glad to share with you my initial reactions.

My central concern as expressed in my academic writing, particularly "Under Cover: The Hidden Costs of Infiltration," 12 HASTINGS CENTER REPORT, August 1982, pp. 29-37, reprinted in Gerald Caplan, ed., ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT (1983), is the almost inevitable corruption of personal relations that extensive use of undercover agents (or, to use a somewhat more loaded phrase, "secret police") brings in its wake. A community that makes extensive use of infiltration of private life as a mode of investigation will generate a kind of paranoia among its citizens about the possibility of trusting even their closest associates to be the people they profess to be.

It is probably accurate to say that we are "at risk" in our everyday lives that persons who are now our friends and associates will change their minds and betray us. The crucial phrase in the preceding sentence is "change their minds," for it implies that they have not been actively misleading us about their feelings and views. What distinguishes undercover agents from ordinary persons who turn out to betray confidences is that the agents by definition do actively mislead and dissemble. And, of course, "deep" infiltration of personal lives, where agents take on the role of "close friends" or even sexual partners, opens the target to ruthless manipulation.

One of the strongest features of S. 804, I think, is its recognition of the corrupting potential of undercover activity. This is seen particularly in §3803(a)(4) and (b)(8)-(10), which requires more than mere "reasonable suspicion" before Government agents or informants can pose as attorneys, physicians, or members of the clergy or news media and elicit confidences from the unsuspecting persons. Instead, "there shall be a finding that there is probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality." In contrast, "reasonable suspicion" does suffice to justify other kinds of undercover activity in §3803(a)(1)-(2).

Given my own views about the particular harms posed by the kind of activity described in §3803(a)(4), I wish to focus on that particular section. I have reservations about the current bill insofar as it

(1) does not require the issuance of a warrant by a judge prior to the initiation of the activity in question; and

(2) accepts a standard of "probable cause" as sufficient to authorize initiation of the activity.

Although I think that the question is a close one, overall I agree with the approach taken by the bill currently before the House of Representatives that does require the issuance of a warrant. I think that the costs of undercover activity are sufficiently high that the mediation of a what the Supreme Court has well described as a "detached and neutral magistrate" is desirable to guard against the almost inevitable tendency of conscientious and well-motivated Justice Department officials to overestimate the weight of any evidence supporting the initiation of such activity.

Let me say, though, that I think it might be worth trading the requirement for a judicial warrant in return for the raising of the standard under §3803(a)(4). Instead of requiring only "probable cause to believe that the operation is necessary to detect or prevent specific acts of criminality," I would prefer the addition of a phrase requiring as well the determination "that no less intrusive mode of investigation is likely to provide the evidence sought." It might be argued, of course, that the word "necessary" implies such a standard, but I am afraid that as a term of legal art "necessary" too often has been made a synonym of "useful" or "convenient."

One way of assuring the meaningfulness of a no-less-intrusive-mode requirement would be to require that all requests submitted to the Undercover Operations Review Committee under §38303(a)(4) be accompanied by a written explanation of the lack of a plausible less intrusive alternative. Moreover the UORC should be required to make a written finding for the record that no such alternative exists.

My procedural hesitations about §3803(a)(4) are present as well regarding §3803(a)(3). Here, too, I think that the dangers to the social fabric presented by infiltration of "political, governmental, religious, or news media" are sufficiently high to call for greater protection than currently contemplated. Such protection could be gained by requiring judicial issuance of a warrant and/or the use of a standard higher than simple "probable cause."

I do have a substantive reservation about §3803(a)(4), in addition to the procedural concerns expressed above. As already noted, the heightened scrutiny of "probable cause" is reserved for situations "When a Government agent, informant, or cooperating individual will pose as an attorney, physician, clergyman, or member of the news media, and there is a significant risk that another individual will enter into a confidential relationship with that person...." (emphasis added) Although I strongly believe that Government agents should rarely if ever pose as members of the groups named, I am also extremely concerned about their posing as intimate friends and insinuating themselves into the lives of their targets on the basis of that "friendship."

I strongly suspect that most persons enter into their primary "confidential relationship[s]" with those persons whom they view as their friends. This is wholly independent of the fact that the legal system, of course, recognizes no "friendship privilege" comparable to the attorney-client, physician-patient, or clergy-penitent privileges. Perhaps my concern could be taken care of simply by changing the word "and" to "or," so that the heightened scrutiny would be necessary whenever "there is a significant risk that another individual will enter into a confidential relationship with [the undercover agent]," even if the agent is not posing as an attorney, physician, clergyman, or member of the news media.

I hope that these comments are helpful to your Committee in its deliberations. I strongly commend the Committee for the obvious seriousness with which it has approached an issue that so vitally concerns the protection of our civil liberties.

With highest regards,

Sanford Levinson

Sanford Levinson
Professor of Law

1771 N Street, N.W.
Washington, D.C. 20036

Edward O. Fritts
President
(202) 293-3516

National Association of Broadcasters

July 11, 1984

Hon. Paul Laxalt, Chairman
Subcommittee on Criminal Law
108 Senate Russell Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

On June 19, 1984, acting upon the recommendation of its First Amendment Committee, the Joint Board of Directors of the National Association of Broadcasters adopted the following resolution regarding S. 804:

> "Resolved, that the Joint Board of the National Association of Broadcasters is vehemently opposed to Congressional adoption of S. 804 or any similar legislation which would approve of any conditions under which impersonation of a member of the news media by a law enforcement agent would be sanctioned as a matter of law. The Joint Board is extremely concerned that adoption of such legislation would seriously hamper the news gathering function, given the fears which would emerge that those presenting themselves as reporters were in fact members of the law enforcement community. Such concerns are certain to impede the free flow of information which is necessary to maintenance of our democratic system."

We would appreciate inclusion of this resolution in the record of proceedings concerning S. 804.

Thank you for your consideration in this matter.

Sincerely,

Edward O. Fritts

cc: Hon. Joseph Biden
Hon. Charles McC. Mathias, Jr.

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

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July 18, 1984

Mr. Edward O. Fritts
President
National Association of
  Broadcasters
1771 N Street, N.W.
Washington, D.C.   20036

Dear Mr. Fritts:

Thank you for sending me a copy of your letter to Senator Laxalt regarding the NAB's resolution on S. 804, the Undercover Operations Act. It may be helpful to share my perspective, as principal sponsor of S. 804, on the problem highlighted by the resolution.

You may already be aware of the background that led up to this bill. In 1982, I served as chairman of a Senate Select Committee which conducted a detailed investigation of federal law enforcement undercover operations. S. 804, which is co-sponsored by seven of the eight members of the Select Committee, closely tracks the Select Committee's legislative recommendations. The bill would establish standards and limits for the FBI and other agencies which conduct undercover operations.

Current law places very few restrictions on undercover operations, even if they threaten privileged relationships such as those between attorney and client, physician and patient, or journalist and news source. The FBI's guidelines allow an undercover operation to be opened even if there is only a "reasonable indication" of criminal activity; other law enforcement agencies are even more permissive. My bill would not create the possibility of an undercover agent posing as a lawyer, physician or journalist. That possibility exists today. Clearly, this situation invites abuse.

S. 804 would go a long way toward correcting this problem, by requiring that law enforcement agencies meet a tougher "probable cause" standard before initiating an undercover operation that may implicate privileged relationships. The bill would also require the Attorney General to issue and enforce written guidelines on undercover operations, and would strengthen Congressional oversight of these activities.

Far from encouraging abuse, the Undercover Operations Act would, for the first time, place effective limits on the use of undercover techniques. In my view, S. 804 strikes the proper balance between the needs of law enforcement and the protection of individual rights.

For your information and review, I enclose a copy of an explanatory statement which I delivered on the Senate floor when this legislation was introduced.

Thank you once again for sharing the views of the National Association of Broadcasters on this important topic.

With best wishes,

Sincerely,

Charles McC. Mathias, Jr.
United States Senator

CM:smk
Enclosure

COMMENTS ON S. 804, SECTION 16
(ENTRAPMENT)

By Professor Roger Park

University of Minnesota Law School

Section 16(a)
Definition of Entrapment

Section 16(a) adopts an objective approach to entrapment. It provides that a defendant is entitled to acquittal, even if he himself was predisposed to commit the offense, if authorities used "methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense."

This approach should be rejected. The subjective approach of existing federal law is preferable to Section 16(a)'s objective approach. The chance that law enforcement behavior will be improved by adopting an objective version of the defense is not great enough to justify acquitting defendants who are fully culpable, or convicting those who were not predisposed but who were enticed by inducements too mild to tempt a hypothetical law-abiding person. The focus of the entrapment defense should be on the effect that the inducements offered had upon the actual defendant, not what effect they might have had upon a hypothetical law-abiding person. (For a full statement of this argument, see Park, The Entrapment Controversy, 60 Minn. L. Rev. 163 (1976).)

Section 16(b)
Entrapment per se

Section 16(b)(2), which provides a *per se* entrapment defense when law enforcement authorities have "manipulated the personal, economic, or vocational situation of the defendant with the purpose and effect of increasing the likelihood of his committing that offense,' is overbroad and confusing.

Most entrapment cases do not arise from ABSCAM-type investigations, but from attempts by agents to make decoy purchases of drugs or other contraband from suspects.[1/] This type of undercover work is virtually indispensable for the detection of contraband-related crimes. It necessarily involves gaining the confidence of a suspect and then making payments for the contraband, and therefore it involves to some degree a manipulation of the personal and economic situation of the suspect. Does a drug dealer in temporary financial straits, who is offered a good price by an agent, have a defense on grounds that his economic situation was manipulated?

Section 16(b)(2) does, concededly, require more than mere economic or personal manipulation. It also requires that the economic or personal manipulation have the "effect" of "increasing the likelihood" that the suspect will commit the offense. This passage adds a watered-down subjective test to an otherwise objective statute. However, Section 16(b)(2)'s subjective test is not the same as the one now used by the federal courts. All that is required is an "increase" in "likelihood." Unlike existing law, the bill does not require that the manipulation actually have caused the defendant to commit an offense that he would otherwise not have committed.

Section 16(b)(2) should be omitted on two grounds. First, its vagueness and novelty is likely to lead to extensive appellate litigation, reversals, and re-trials. By contrast, the present entrapment test is relatively simple to administer. The defense almost always goes to the jury, the pattern instructions are widely accepted as valid, and reversal on appeal is extremely rare. See Park, supra, at 178 and n. 44 (1976)(reversal in 27 of 405 reported cases).

Second, the present subjective test covers most of the legitimate concerns of Section 16(b)(2). Under the present subjective test, personal or economic manipulation constitutes entrapment if it caused a defendant to commit a crime that he or she was not otherwise predisposed to commit, and the government must prove predisposition beyond a reasonable doubt.

If retained, Section 16(b)(2) should be revised so that it covers only economic threats, not any form of economic "manipulation." Economic threats are sufficiently offensive to justify a per se defense that covers even persons predisposed to commit the crime; economic and personal "manipulation" is not.

Section 16(b)(1), which provides a per se defense when the agent threatened harm to person or property, should be retained. Such conduct by agents ought not to be condoned even if the defendant in the particular case was predisposed to commit the crime. Some courts would now hold this conduct to be a violation of due process, even under the subjective test, but this outcome is not assured and it does no harm to codify the principle.

Section 16(b)(3) sets forth a per se defense covering situations in which the government provided goods or services necessary to commit the crime. In drug cases, this rule would limit the power of the government to provide drugs or means for manufacturing drugs. Conduct of this nature obviously raises a greater danger of corrupting the innocent than does the mere making of decoy purchases. In general, the rule is a good idea, provided that it is not construed to cover the situation in which the government agent has merely infiltrated a conspiracy and acted as a courier, or in which the government has intercepted a courier and persuaded him to cooperate. In these circumstances, delivery of drugs by an agent or informer to the defendant can be a legitimate technique. See United States v. Mahoney, 355 F. Supp. 418 (E.D.La. 1973), United States v. Lue 498 F.2d 531 (9th Cir.), cert. denied 419 U.S. 1031 (1974).

In short, I favor the elimination or drastic limitation of the per se defense set forth in Section 16(b)(2), and the retention of the per se defenses established in Sections 16(b)(1) and 16(b)(3). This position is consistent with my view that Section 16(a) should be revised to state a subjective test for entrapment. There is no reason why 16(a) cannot state the subjective test, and 16(b) state certain specific limits on the conduct of law enforcement officials. Section 16(a) would then state the principle that defendants who were not predisposed should not be convicted of crimes set in motion by law enforcement agents, while 16(b) would state the principle that some types of inducements are so extreme that defendants should be acquitted even if they were predisposed. There is no inconsistency between the two principles.

Judge-Jury Issues

If the objective approach of Section 16(a) is retained, then the entrapment issue should be decided by the judge, not by the jury.

The original proponents of the objective test favored giving the issue to the judge, and their views were supported by convincing arguments. The purpose of the objective entrapment defense is to control police conduct. Judges are better able than jurors to take a long view about the effect of a decision on police conduct. Moreover, judges write opinions, and jurors do not; only judicial opinions, through the gradual accumulation of precedent, can give guidance to law enforcement officials. See, e.g., Sherman v. United States, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring); People v. Cushman, 65 Mich. App. 161, 165-66; 237 N.W.2d 228, 231 (1975).

There is another reason for giving the objective-test issue to the court. Jurors simply will not be able to understand instructions based on the objective test set forth in Section 16(a). In order to apply the section, the juror would have to decide whether "the inducement was accomplished using methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense." The juror is likely to be confused about the nature of this hypothetical "normally law-abiding citizen." Is he or she an average person? A person like the juror? A person like the defendant? The defendant himself?

Recent research on the comprehensibility of entrapment instructions indicates that jurors are likely to think of the "normally law-abiding" person as an average person, and that the tendency to make this sort of mistake is positively correlated with the juror's tendency to convict. (Borgida & Park, in progress.) Measuring a defendant's conduct against the standard of the average person is too harsh, since the average person would not commit a crime like selling illegal drugs except under the most extreme inducement. The better standard would be whether a hypothetical person who was normally law-abiding but had a weakness for the crime charged would have committed the crime. If the hypothetical person is not endowed with some qualities of abnormal weakness, then even the defendant in the landmark case of Sherman v. United States, 356 U.S. 369 (1958), would not be entitled to acquittal. In Sherman, a narcotics addict who was receiving treatment was persuaded by a government informer to purchase and sell drugs, something that the average person would not have done. All of the Justices, whether they favored the subjective test or the objective test, agreed that entrapment had occurred.

When this tendency to think of the "normally law-abiding" person as an average person is combined with Section 16(a)'s shift in the burden of proof to the defendant, jurors are likely to convict more readily under the objective test than under the subjective test. In a recent experiment, jurors applying the objective test under instructions referring to the "normally law-abiding person" showed a trend toward convicting more often in the case of defendants with no prior record than did jurors applying the subjective test. (Borgida and Park, in progress.) In this experiment the burden of proof was on the prosecution in both conditions. Placing the burden of proof on the defendant might enhance this tendency to convict.

Another aspect of the objective or hypothetical-person test can cause difficulty in juror comprehension. The effect of government conduct on the hypothetical law-abiding person must be judged in part on the basis of what took place between the actual defendant and the agent, thus creating confusion about whether the actual defendant or an imaginary person is the figure to be borne in mind. See Park, supra, at 204. The California and Iowa pattern objective-test instructions (excerpted in the footnote[2/]) seek to explain this to the jury. Their attempts at explanation illustrate the extreme difficulty of setting forth the hypothetical-person standard in a way that will be intelligible to the ordinary juror.

It may be possible to write better instructions than those that now exist, but probably the hypothetical-person standard cannot be explained simply and accurately even with the best of efforts. The concept is inherently complex. It is more difficult even than the tort concept of a reasonable person, because the hypothetical person of entrapment doctrine must be endowed with special traits, whereas it normally does no harm to regard the reasonable person as an average person.

It is appropriate to give entrapment to the jury in a subjective test jurisdiction, where the basic issue is the culpability of the defendant, and the jury is asked to decide whether a real defendant was predisposed. However, in an objective test jurisdiction, the basic issue is police conduct, and the trier is asked to apply a complex hypothetical standard. For these reasons, the entrapment issue should be given to the judge.[3/]

FOOTNOTES

[1/] The 405 reported federal entrapment cases in the period 1970-75 fell into the following categories:

Drug offenses (excluding alcohol)	65%
Counterfeiting	7%
Firearms offenses (transportation, sale)	7%
Alcohol offenses	6%
Bribery, government corruption	6%
Other offenses	9%

See Park, The Entrapment Controversy, 60 Minn. L. Rev. 163, 230 n. 223 (1976).

The drug, firearms, and alcohol offenses almost invariably involve purchase of contraband.

2/ The relevant portion of the California instruction reads as follows:

"Finally, while the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this purpose, for example, are the transactions preceding the offense, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission."

CALJIC 4.61 (1981 Revision).

The comparable portion of the Iowa objective-test instruction provides as follows:

"In applying this instruction, you should consider the course of conduct between the (law enforcement officer, sheriff, agent, policeman, etc.) and the defendant. The transactions leading up to the offense, the interaction between the agent and the defendant and the defendant's response to conduct of the agent are all to be considered by you in judging what the effect of the agent's conduct would be on a normally law-abiding person."

2 Iowa Uniform Jury Instruction Annotated no. 213 (1982).

3/ As an intermediate measure, the defense could be given the option of severing the entrapment issue and trying it before the judge, while preserving other issues for the jury. Cf. State v. Grilli, 230 N.W.2d 445, 455 (Minn. 1975). This option, however, would not protect the prosecution from the dangers of jury confusion.

Part 2.—Newspaper Articles

[From the National Law Journal, Mar. 26, 1984]

When the Bureau Listens, Are Any of Us Protected?

(By Theodore I. Koskoff)

The year 1984 is here and the Orwelian debate has heated up. George Orwell foresaw a bleak world, with its bleakest aspect a complete lack of all privacy. Even private thoughts were banned; total surveillance by the state assured order and security.

When Mr. Orwell died in 1950 at the beginning of the McCarthy era in the United States, some thought his vision was close to reality. But in less than a decade Sen. Joseph R. McCarthy and his adherents were in bad odor and individual rights advocates heaved a sigh of relief.

Many people, including those who agreed with Senator McCarthy's goals of identifying Communists in sensitive and not-so-sensitive government positions, objected to his methods—methods that ultimately defeated him and resulted in the downfall of McCarthyism. The end did not justify the means.

Both the Abscam and Operation Greylord undercover operations bring into question the Justice Department's methods, which subvert the system and traditional democratic values through bugging, wiretapping and, in the case of Greylord, staging phony arrests and mythical prosecutions. For the Justice Department to use the techniques of collectivist societies for the purpose of catching a few allegedly crooked public servants in otherwise overwhelmingly honest institutions pays too high a price for sacrificing the traditional value of the very institutions they are investigating. This leaves me with a feeling of disgust—a feeling not only directed at the malefactors who sooner or later would probably be caught anyhow, but more directed toward the Justice Department, which behaved in these cases at least immorally, if not illegally. Whenever one thinks about whether the end justifies the means, one has to, at the very least, balance the costs of the means against the results of the end in both qualitative and quantitative terms. On this scale, both the Abscam and Greylord results suffer miserably.

One cannot morally or philosophically separate the end from the means, however desirable the end may be. As philosopher John Dewey pointed out, they are a continuum and inseparable.

What is the effect on the institutions themselves of these two operations they are trying to protect? Some argue that the effect is salutory, that their results purify the institutions involved and enhance them in the public mind. I disagree. I believe the results fortify feelings of mistrust that much of the general public has in our democratic institutions. I believe these scams by the Justice Department do not have a great "purifying" influence on those institutions but do immeasurable harm to them. People tend to believe the worst and to condemn the institutions as a whole because of a few "bad apples."

There is not institution beyond the law. Recent events have shown us that this applies even to a president, who really fell by tripping himself. But the Congress and the judicial system should not be tampered with in such a slimy, underhanded fashion as was done in Abscam and Greylord. Our institutions are the bulwark of a free society, and given a chance to do so, they tend to cleanse themselves through the political and judicial process. Malfeasance in office sooner or later is exposed by other means or exposes itself.

Privacy and the freedom to go about one's business without fear of being watched or overheard is not merely the desire of the criminal, the guilty, the liberal. It has been a desire and need of humans and even animals from prehistoric times. Without at least some privacy, men and women and even rats may go mad.

Perhaps as basic as the human need for privacy is the desire of some to eavesdrop on their fellows. Since Senator McCarthy's time, the eavesdropping industry has become gigantic. Its technology is awesome. Technically, there is no place on this planet or even in outer space where you can be certain you will not be observed or put on tape. Hidden television cameras with remote and flexible lenses can follow where no other can go. Miniaturization allows a conversation to be overheard by the transmitter in a martini's olive. Walls can be seen through and distances provide no security.

While in collectivist societies there is little protection, in the United States we labor under the delusion that we have the force of law to protect an individual's privacy. But in the recent Greylord and Abscam investigation, the force of law made its own use of covert observation methods and technology. Not only were suspects and planted FBI agent-actors seen, heard and taped, but while bugging judges' chambers, the FBI became privy to hundreds of innocent conversations which it had no right to hear or record. From vast experience, we know that these records will be retained and form a basis for dossiers on individual citizens, something that should worry anyone concerned about privacy and individual rights.

Innocent citizens should be protected from the taping and evaluation of their conversations by the government, even if these citizens are conversing with FBI "suspect." How does the FBI choose these "suspects?" And who has the power to target an individual for an FBI covert investigation? In the days when the FBI was run at the whim of J. Edgar Hoover, the bureau—as we know now—considered its responsibility to be only the American people as a whole, making it effectively free of responsibility to any individual. But who today is responsible for the FBI's investigations and its continuing heavy reliance on illegal and immoral methods?

These methods garner a great deal of press attention and the FBI claims they are effective. I doubt if they generally are effective and whether we hear about their failures. But even if they are effective, are they worth the damage done to our institutions? In the Greylord investigation, the effectiveness seems very thin. The investigation continued for three years and cost untold millions of dollars. It produced indictments of three out of 322 judges, one of whom had already retired. It seems that the mountain has labored and brought forth a mouse. Of course, what we don't know about Greylord is how many judges were bugged who were innocent of any wrongdoing and the vast number of private conversations of law-abiding citizens monitored by the FBI.

But even if this investigation were indisputably effective and resulted in many arrests, its amoral character would still be objectionable. If arrests and convictions were the purpose of our system of justice, why forsake the thumbscrew and the rack? This method of covert investigation by our government agencies and police perverts the system it means to protect.

The few crooked judges and politicians in office should be rooted out of the system and punished for their misdeeds. But we are indeed a bankrupt society if the only means that may be found to root them out is one that increases corruption, violates the rights of the innocent, as well as the guilty, and perverts the entire system of justice. I believe that decent police methods, the political process and criminals who slip up will sooner or later accomplish the same goal.

Can the FBI find no other way to investigate other than trapping suspects by using a Judas judge as an undercover agent, secret videotaping and recording and dressing up and play-acting as in Greylord? In addition to their other requirements, will agents have to attend acting classes?

These investigations may attract more attention and are undoubtedly more fun for the agents than straightforward police work, but in the process the amusement erodes public confidence in our institutions. The ends do not justify the means.

Benjamin Disraeli said: "Individualists may form communities, but it is institutions alone that can create a nation." If is far easier to tear down these institutions than to build them. The citizens in Mr. Orwell's 1984 had no faith in institutions, only in Big Brother. And in absolute, deadly order and security. How could anyone think otherwise when every move was observed?

[From the National Law Journal, May 21, 1984]

"PRIVATE ABSCAM" TRIAL SET IN N.Y.

NEW YORK.—The chief operative in the Abscam probe is returning to the courtroom here as a witness in what is believed the first criminal trial to stem from a privately financed, court-sanctioned undercover "sting" investigation.

Melvin Weinberg, the convicted swindler who posed in Abscam as the representative of an influence-peddling Arab sheik, was hired by a private investigation firm to "sting" businessmen who allegedly sold counterfeits of the famed Louis Vuitton haute couture handbags.

As a result of the operation, six defendants were scheduled to go on trial May 14 before U.S. District Judge Charles L. Brieant Jr. in Manhattan on charges of criminal contempt of court.

The private investigation, paid for by Louis Vuitton et Fils, S.A., used many Abscam devices and has elicited a number of the same protests from defense lawyers that Abscam drew, as well as criticism of the private origins of the investigation.

"I think it poses a very serious future problem," said James A. Cohen, an attorney with Washington Square Legal Services here who represents defendant Barry Klayminc. "We just can't have cowboys, which is essentially what these people are, running around and doing these kinds of things."

Mr. Cohen says one of the dangers posed by private investigations occurred in this one: He claims Mr. Weinberg did and said things no government operative would, including advising one defendant during a videotaped meeting not to discuss the meeting with his lawyer.

The secret videotaping of meetings in hotel rooms was not the only similarity to Abscam involved in the private investigation.

As in Abscam, Mr. Weinberg promised financing for a venture as a lure and an unwitting middleman was used to find potential targets. In addition, a former FBI agent who worked on Abscam was one of the private investigators who went undercover with Mr. Weinberg.

The private probe started in April 1983 after Kanner Security Group, a Miami private investigation firm owned by former FBI agents, called holders of prestige trademarks and offered to find suspected infringers through a "sting."

Vuitton, which had filed 80 trademark suits in New York alone, agreed and assigned one of its lawyers, J. Jospeh Bainton of the New York firm of Reboul, MacMurray, Hewitt, Maynard & Kristol, to oversee the operation.

POSED AS "MEL WEST"

U.S. District Judge Morris E. Lasker's order permitting the investigation authorized the videotaping of a meeting between Mr. Weinberg—who posed as entrepreneur 'Mel West'—and a suspected infringer at the Plaza Hotel in New York City.

Judge Lasker also appointed Mr. Bainton and another Reboul MacMurray lawyer, Robert P. Devlin, as special federal prosecutors and authorized them to gather evidence for an Abscam-like probe. According to Mr. Bainton, this was the first time a judge appointed a private attorney to conduct an undercover investigation.

The probe zeroed in on businessman Sol Klayminc, who had been convicted previously of criminal contempt for violating an injunction that barred him from selling counterfeit Vuitton handbags. He had been sentenced to probation after agreeing to pay a $100,000 civil settlement.

According to an affidavit Mr. Bainton filed, Mr. Klayminc now wanted to establish a factory in Haiti to manufacture imitation Vuitton handbags in an operation that would have netted between $31 million and $38 million a year in profit.

Mr. Bainton said Mr. Weinberg contacted Mr. Klayminc through an unwitting intermediary, identified in court papers as Nathan Helfand. Much as he did during the Abscam investigation, when he offered then-New Jersey Sen. Harrison A. Williams Jr. financing for a titanium mine, Mr. Weinberg made it known that he might be able to arrange financing for the Haitian factory, according to court papers.

A HOST OF TAPES

More than 100 audiotapes and seven hours of videotapes were made during the investigation, including many at the Beverly Wilshire hotel in Los Angeles, where the district attorney's office monitored the operation.

Based on the recordings, Mr. Bainton was granted a show-cause order for criminal contempt against Mr. Klayminc, his son Barry, Mr. Helfand and four alleged business associates. One of the defendants pleaded guilty last week.

As in Abscam, defense lawyers tried to dismiss the charges on grounds their clients' due process rights were violated.

Judge Brieant refused their requests in an April 9 opinion. *U.S. v. Karen Bags,* 83 Cr. Misc. 1. He also upheld the appoinment of Mr. Bainton and Mr. Devlin as federal prosecutors.

"Recognizing that it is generally deemed unethical for an attorney to participate in the surreptitious recordings of conversations, Bainton noted that he would not be similarly constrained if his application to be appointed special prosecutor were granted," the judge wrote.

In addition, Judge Brieant said that once appointed, Mr. Bainton was "protected by the same official immunity that federal officials enjoy in carrying out their duties, regardless of the source of his compensation."

The defendants also tried unsuccessfully to disqualify Mr. Bainton from the case by arguing that he could not be an objective prosecutor because his client, Vuitton, bankrolled the investigation.

They argued that a dissatisfied Vuitton might take future legal business elsewhere if Mr. Bainton did not meet its expectations. Judge Brieant rejected that argument.

The defendants' attorneys, including Mr. Cohen and Sol Klayminc's lawyer, William Weininger of New York's Samuel & Weininger, also argued that the Federal Rules of Criminal Procedure did not permit a private lawyer to start an investigation the way Mr. Bainton was permitted to. But Judge Brieant said this was not a "hunting expedition" used for "ensnaring" the defendants before any illegal act was committed, as their lawyers charged.

"Vuitton's attorneys were given the authority to define more fully the boundaries of an already well-developed contempt," the judge wrote.

[From the National Law Journal, June 4, 1984]

The Use of Scams: Undercover Techniques Are Necessary To Ferret Out Corrupt Public Officials

(By John S. Martin Jr.)

The FBI's Abscam and Greylord investigations have provoked an outcry from a number of public officials, members of the bar and other commentators who suggest that the FBI's methods in these investigations were unprecedented, possibly illegal, immoral and unnecessary. A March 26 article on this page is typical of many of those attacks. Careful analysis suggests, however, that the only novel thing about these investigations was the fact that they were directed at corrupt legislators, judges and lawyers.

The methods used in Abscam and Greylord are far from unprecedented. They are commonly used by the FBI and other law enforcement agencies in the day-to-day investigation of such common crimes as dealing in stolen property or narcotics. In cases involving organized criminal enterprises, these methods have proven to be the most effective in reaching the upper echelons of the criminal hierarchy. Far from being illegal, these methods repeatedly have been approved in judicial opinions, and wiretapping and bugging specifically have been authorized by Congress.

Analysis of the method used in the Abscam and Greylord investigations must begin with the recognition that law enforcement probes fall into two broad areas. One is the reported crime, where a victim, having undergone a rape, mugging, assault or robbery, calls the police and provides them with some description of the perpetrator, the identity of other witnesses and an indication of the physical evidence that can be collected and examined to identify and convict the culprit.

The second broad area of criminal investigation involves situations in which no one having specific knowledge of the crime has any interest in reporting it to law enforcement agents. Large-scale narcotics transactions and bribes to public officials are clearly carried out by parties who not only have no interest in reporting the facts of the crime to law enforcement officials, but who also take every precaution to see that there is no evidentiary trail—bribes are not paid by check and international narcotics transactions do not involve letters of credit.

It is in this second category of criminal investigation that effective law enforcement requires the use of undercover agents, scams, stings and electronic surveillance. When used against the more traditional criminal element, these methods generally have been publicly applauded rather than criticized. Anyone who keeps up with the news has seen numerous reports of the police using undercover sting operations to catch those who deal in stolen property. In recent years some of the most effective investigations used to convict those who deal in stolen Social Security and welfare checks have involved Secret Service agents who set up check-cashing businesses in which they pose as dishonest individuals willing to buy stolen checks. There has been no outcry against these investigations.

Why, then, is it immoral for undercover agents to pose as dishonest citizens in order to obtain evidence against corrupt public officials? If the response is that there is a chance that undercover agents may persuade an otherwise innocent individual to commit a crime, then I would ask, "Is there any less likelihood that this will occur if the undercover agent is representing himself as someone who will pay good money for a stolen television set than if he is representing that he will pay a bribe to a public official?" Indeed, one would hope that there is a greater danger of enticing a poor person to commit a crime by the lure of easy money for stolen goods than there is of enticing an honest public official by presenting the opportunity for a bribe.

In any event, in each case the law provides the defense of entrapment if the evidence shows that the law enforcement officials overstepped proper bounds in inducing an otherwise-innocent individual to commit a crime. In the Abscam cases, the entrapment defense was repeatedly raised by the corrupt officials involved and those claims were unanimously rejected by the courts, which upheld every conviction obtained as a result of this investigation. Thus, it cannot reasonably be argued that the Abscam methods were illegal. Furthermore, since the issue of entrapment was repeatedly rejected by the jury, it cannot fairly be suggested that the FBI's conduct was immoral by contemporary community standards.

The use of wiretapping and other forms of electronic surveillance in these cases was also no different than the use of those techniques in other criminal investigations.

In 1968 Congress enacted legislation authorizing the interception of wire and oral conversations pursuant to court authorization (Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510–2520). The statute followed shortly upon the opinion in *Katz v. U.S.*, 389 U.S. 347 (1967), in which the Supreme Court clearly indicated that judicially authorized electronic surveillance would not violate the Fourth Amendment prohibition against unreasonable searches and seizures, and the constitutionality of the statute itself has been upheld in numerous cases.

A court order authorizing wiretapping and eavesdropping may only be obtained by showing that (1) there is probable cause to believe that an individual is committing one of a limited number of specifically enumerated offenses; (2) there is probable cause to believe that communications concerning that offense will be overheard; (3) that normal investigative procedures appear unlikely to be successful in obtaining sufficient evidence of the crime; and (4) that the facilities from which or the place where the communications will be intercepted are being used in connection with the commission of the offense under investigation. Additional procedural protections are found in the statutory requirement that periodic reports on the results of the electronic surveillance be made to the judge who issued the order and that the surveillance be conducted in such a way to minimize the interception of innocent conversations. By statute, the application for an electronic surveillance must be authorized by the attorney general or an assistant attorney general specifically designated by the attorney general. In practice, the FBI has added the additional requirement that the application be authorized by the director of the FBI.

While there is some public perception that government wiretapping and eavesdropping are widespread and easily accomplished by space-age electronic devices such as microphones hidden in the olive of a martini, this perception is far from reality. In the first place, electronic surveillance requires a tremendous amount of law enforcement manpower. In order to comply with the statutory minimization and reporting requirements, teams of agents must be assigned to monitor the electronic sureillance around the clock. Furthermore, hours must be spent complying with the procedural requirements and preparing transcripts of the conversations and reports to the judge who signed the original order. Thus, the cost factor alone limits the use of this technology to cases of major importance. Indeed, as a defense lawyer. I have often told clients who were concerned that the government was attempting to overhear their conversations that, while I did not want to bruise their egos, they simply were not important enough for the government to make the commitment of time and expense required for a wiretap.

Nor are the electronic devices anywhere near as effective as the public perception would suggest. Any experienced criminal lawyer knows that one of the major issues litigated with respect to any electronic surveillance is the accuracy of the transcript of the recorded conversation because the quality of the reception from the hidden microphones is generally extremely poor.

Yet despite the expense and limitations of available equipment, electronic surveillance has proved to be perhaps the most effective investigative method of obtaining evidence against the upper echelons of criminal society. While it is easy for an undercover agent to go out on the streets of New York and make a case against a street pusher of narcotics or a loan shark or a gambler, electronic surveillance provides the most, and often the only, effective method of obtaining evidence against major narcotics wholesalers and the leaders of organized crime. The vast majority of major narcotics and organized crime prosecutions in the city of New York over the last 10 years has involved electronic surveillance of oral communications.

Those who suggest that scams and electronic surveillance are not necessary because there are other equally effective means to prosecute serious crimes simply do not know what they are talking about. As noted above, by statute, electronic surveillance only can be authorized if the judge is satisfied that there are no other effective means to gain the necessary evidence. Anyone who has been engaged in law enforcement both before and after the legislation authorizing electronic surveillance will attest to the fact that cases are being made today through the use of court-authorized wiretaps and bugs, which simply could not have been made before the legislation.

In addition, those who say there are better methods of law enforcement to utilize rarely scrutinize the alternatives. The use of scams, undercover agents and electronic surveillance is much less likely to result in an unwarranted conviction than is reliance on accomplice or even eyewitness testimony. There is a much firmer basis for public confidence in the integrity of the Greylord prosecution—where some of the proof will come from the judges' own words in recorded conversations—than in the prosecution of U.S. District Chief Judge Harry C. Claiborne of Las Vegas, Nev., where the prosecution rests primarily on the testimony of a convicted former brothel owner.

Similarly, of the recent major narcotics prosecutions in the Southern District of New York, only one involved a situation where there was no electronic surveillance. In that case, the main evidence was provided by Leroy "Nicky" Barnes, a notorious narcotics dealer. At the time those charges were announced, there was a much stronger public reaction to the government's use of testimony from an individual as corrupt as Mr. Barnes than there has been to the use of electronic surveillance in any similar narcotics case.

In this fallible world, there is no way that we can ensure that law enforcement officials will not make honest mistakes or that they will not, on occasion, overreach or overreact. While it is reasonable to be concerned about the danger to the right of privacy and other freedoms posed by the use of scams or electronic surveillance, these techniques pose no greater threat than other well-established techniques. I would feel less injured in my right to privacy were I to learn some time after the event that certain of my telephone conversations were overheard on a court-authorized wiretap than I would if armed agents, acting pursuant to a search and arrest warrant, entered my home with guns drawn physically to search the premises and arrest me. In each case the agents might be acting either illegally or on the basis of a good-faith mistake, but the traumatic effect would clearly be greater in the case where the sanctity of my home had been physically invaded and I had been dragged off to jail in handcuffs.

Nothing that has come out with respect to Abscam or Greylord suggests that the use of scams or wiretaps is more subject to abuse than the use of warrants for physical searches and seizure or the use of accomplice witnesses.

Event if one accepts the conclusion that the use of scams and electronic surveillance are appropriate law enforcement techniques, the question remains whether there is something about the status or the function of legislators, judges and lawyers that makes it inappropriate to utilize these techniques. With respect to electronic surveillance, obviously, there is legitimate concern for preventing unwarranted intrusion into conversations of judges and legislators reflecting their deliberations on cases or bills under consideration. There is an even stronger concern that electronic surveillance directed at a lawyer might result in the overhearing of privileged communications.

Yet similar concerns exist in other cases where there is a chance of overhearing privileged communications between a doctor and patient or husband and wife, and the same concerns exist with respect to physical searches and seizures of documents. Such concerns suggest the need for careful judicial scrutiny of applications for court orders for such surveillances to ensure compliance with the statutory requirement of a showing that the phone or premises in question is being used to conduct criminal conversations and that other methods of detection are not available. These concerns are not, however, sufficient to justify providing judges, legislators and lawyers with virtual immunity for the commission of crimes that can effectively be detected only through the use of electronic surveillance. Were we to adopt a rule that a lawyer could not be subject to electronic surveillance because of the fear that privileged communictions might be overhead, our law schools would be even more crowded than they are today.

The statutory requirement that agents conducting electronic surveillance must conduct it in such a way to minimize the overhearing of innocent conversations, combined with careful judicial scrutiny of the electronic surveillance conducted in particular cases, should provide adequate protection against unwarranted law enforcement intrusion into the attorney/client privilege or other areas where confidentiality should be recognized.

Similarly, while the use by the executive branch of scams and stings directed at members of the legislative or judicial branches raises legitimate concerns that such investigations may arise from an improper political motive, the same concern exists with respect to any criminal probe of a public official. Is an innocent public official more injured if a misguided undercover agent offers him a bribe than he would be if a misguided prosecutor obtained a grand jury subpoena for his bank records? In each case the courts have sufficient supervisory power over their own processes to prevent such abuses.

Judge Learned Hand once noted that "Justice, I think, is a tolerable accommodation of the conflicting interests of society." In an ideal world, the techniques of Abscam and Greylord would be unnecessary and unwarranted. In the society in which we live, however, these techniques represent a tolerable accommodation of individual rights and society's need to protect itself from corrupt public officials and others engaged in serious criminal activity.

[From the New York Law Journal, Nov. 13, 1984]

CRIMINAL INVESTIGATIONS—"STING" PROBES AND HONESTY TESTS

(By Alan R. Kaufman)

Should the Federal Government subject citizens to honesty tests? That question was brought into focus by *United States v. Gamble,*[1] a recently reported case of the U.S. Court of Appeals for the Tenth Circuit. The penalty for failing the test is criminal prosecution and conviction.

The *Gamble* case was a government "sting" operation, an offspring of the technique in the Abscam cases.[2] Before discussing the *Gamble* case and its ramifications, some background of this investigative technique is set forth.

ABSCAM AND ITS OFFSPRING

Since the first revelations of the Abscam investigation, controversy ensured concerning the propriety of governmental involvement in the creation or instigation of criminal opportunity. Among the descendants of Abscam have been the John DeLorean case and Operation Greylord (indictments of judges, lawyers and clerks in Cook County, Illinois). Each of these prosecutions resurrected the arguments. These, and other investigations, have received their fair share of criticism on the ground that the government, in essence, created and caused the crime to be committed. If not for the government's conduct, the argument continues, there would not have been any crime.

Defenders of the investigative technique responded that the only way to gather evidence against well-insulated figures was to engage in the kind of undercover activities which eliminated the target's insulation. Thus, the govenment would create a controlled set of circumstances in which most, if not all of the players, were government agents or operatives.

The utility of this technique, from a policy perspective, is premised on the notion that those whom the government had some reason to believe had previously engaged in or were engaging in criminal activity could most effectively be apprehended through this type of investigative technique.[3]

UNCONSCIONABLE PROCEDURE

As a former federal prosecutor, I have subscribed to the rationale of the Abscam-type investigative technique, and continue to do so when it is properly applied. However, I have always believed that targets of such investigations should be individuals who are reasonably suspected of having engaged in past similar criminal conduct. To engage in a sting investigation against an individual without a reasonable belief of prior criminal conduct is unconscionable, something the federal government should never undertake. Such an investigation would be nothing more than an honesty test of the targeted individual.

In defending the Abscam investigative technique, prosecutors have given assurances that it is reserved for only those instances where there is a reasonable belief that the targeted individual had engaged in past criminal conduct. Thus, then-Assistant Attorney General Philip Heymann testified:

"The opportunities for illegal activity created in the course of an undercover operation should be only about as attractive as those which occur in ordinary life because the object of a decoy undercover operation is to apprehend *only those criminal actors who are likely to have committed or to commit similar criminal conduct on other occasions.*"[4]

And, in defending the Greylord investigation, U.S. Attorney Dan Webb of the Northern District of Illinois, stated:

"With Greylord it took us eighteen months before we even tried to implement our plan. We did not just go out there on a fishing expedition. To go there and try to test the system and try to test an honest judge would be wrong and we didn't do it." [5]

PROSECUTORS' POSITION

Prosecutors however, have resisted any court-enforceable threshold of a reasonable-belief standard which would be required in order to initiate such an investigation, saying that it would be unworkable and constitute a judicial intrusion on prerogatives of the Executive Branch. Instead, reliance on the good judgment and discretion of experienced prosecutors and career criminal investigators is advocated.

If appearances are not deceiving, the *Gamble* case makes it difficult to have confidence in such assurances. In *Gamble,* an Abscam-type investigation was seemingly perpetrated as an honesty test on an unsuspecting doctor, resulting in his conviction for mail fraud. Postal inspectors contrived the following scenario: They obtained driver's licenses, automobile registrations and insurance coverage using fictitious names. They then obtained from cooperative local police phony accident reports for automobile collision which never occured. Summonses were issued to the inspectors, who subsequently appeared in court and pleaded guilty to traffic infractions before an unsuspecting judge and prosecutor. Liability for the "accident" thus having been established, other inspectors, posing as the accident victims, visited Dr. Gamble's office to enlist his aid in establishing medical injuries where none existed. How many doctors the inspectors visited before they came upon Dr. Gamble is not reported, nor is any rationale for why he was targeted.[6]

In Dr. Gamble though, they found a sympathetic ear. He suggested that back and neck injuries were best to claim because they were difficult to disprove. The inspectors then instructed the doctor on how to fill out the insurance forms, and the inspectors dealt with the insurance company.

COURT'S DESCRIPTION

This is the Tenth Circuit's description of the investigation:

"The government here enmeshed in criminal schemes fabricated entirely by government agents a black doctor who had no criminal record and *with respect to whom the agents had no apparent hint of a predisposition to criminal activity.* The government sent agents apparently posing as poor people to a doctor serving a ghetto community to seek to have the doctor help them out financially in appealing circumstances, circumstances in which the doctor might appear callous if he did not cooperate. The record implies that the inspectors pretended to be economically disadvantaged people typical of defendant's patient population. Sympathy based upon economic disadvantage or race may have been played upon as a factor in inducing defendant to join what he informed the inspectors was 'the white boys' game.' Defendant sought very little profit from his participation, apparently charging only normal office rates for the time he spent with the inspectors." [7]

However, the Court affirmed Dr. Gamble's conviction. Entrapment was not in issue, apparently because the doctor succumbed to the inspectors' temptation without much hesitation, thus raising defense problems concerning predisposition.[8] The issue of due process on which the Tenth Circuit wrote—should the government's having engaged in outrageous conduct serve to vitiate the conviction (citing *Hampton v. United States,* 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973))—met with no success. The Court held, *inter alia,* that "the government need not have a reasonable suspicion of wrongdoing in order to conduct an undercover investigation of a particular person." *Id.* at 860.[9]

As a matter of constitutional juris-prudence of general application, that is an unremarkable proposition[10] with which I do not take issue. However, the fact that the Constitution does not forbid all such investigations does not mean that they should be initiated. As a matter of the federal government's policy of law enforcement (which can be either a function of executive discretion or legislative mandate), the fact that some federal law enforcement officials have demonstrated the willingness to engage in such an honesty-test type of investigation is a chilling prospect. This article is designed to focus attention upon that prospect.

SHOULD HONESTY BE TESTED?

Should the government conduct honesty tests on its citizens? For discussion purposes, using a state context, the most glaring hypothetical situation may be the following:

"The crime of larceny is committed if someone who finds lost property fails to take reasonable measures to return the property to the owner.[11] Should the New York police, in order to test who is honest and who is not, randomly leave bags of money, imprinted with the presumed owner's name (e.g., ABC Bank and Trust Co.), on the doorsteps of homes to see who will return the money and who will not, and then prosecute the latter?

The federal analogue may be the following. A crime is committed if a deceased's relative keeps and cashes Social Security retirement checks which continue to be sent after the payee's death.[12] This apparently occurs with a distressing degree of frequency.[13] Should the federal government purposely and purposefully send out retirement benefit checks to deceased individuals to see which relatives of these decedents will return the checks and which relatives will not, and then prosecute the latter?

People who are basically honest and who have never committed crimes before are still people who are subject to temptation. Some percentage of people, in the foregoing examples, will likely fail the honesty test, people who would never have stumbled into criminality but for their government's having subjected them to temptation which they were unable to resist.

Another former federal prosecutor, with experience in sting operations, is quoted as saying "All the inducement in the world won't make an honest, law-abiding person commit a crime. It's not true that 'every man has his price.' People who are not predisposed to commit crimes won't commit them, no matter what the price is." [14]

DISPUTED VIEW

That is a view, the universal application of which reasonable people might dispute. If accepted, that view means that the honesty-test type of investigation is to be encouraged, since, by definition, anyone who fails the test, regardless of the size and circumstances of the inducement, is predisposed to criminality and thus deserving of condemnation and punishment.

It has been said that "the government's ability gratuitously to generate crime through random honesty checks clearly involves unjustified intrusion into citizens' privacy and autonomy . . . Such undercover infiltration and provocation may also produce a police state mentality evoking fear, paranoia, and mutual distrust among friends and colleagues. Historically such tactics have been favored by totalitarian regimes . . ." [15]

Fortunately, Justice Department guidelines recognize the dangers inherent in honesty-test investigations, and its provisions call for a "reasonable indication" that a federal crime has occurred or is occurring before an investigation may be commenced.[16] Unfortunately, the guidelines provide no remedy are subject to individual officials' varying philosophies of criminal law enforcement. Indeed, a former Justice Department official is reported as advocating "the use of undercover techniques as a preliminary investigative tool even in the absence of circumstances giving rise to a reasonable suspicion that criminal activity has occurred, is occurring, or is likely to occur." [17]

If the Gamble investigation had been done by the FBI, it would have violated its guidelines due to the apparent absence of any reasonable indication that a crime had been or was being committed. Yet, the violation of internal guidelines provides no relief to the defendant who is convicted as a result of a wrongfully-initiated investigation. *United States v. Caceres,* 440 U.S. 741 (1979).

DISMISSAL REFUSED

In *Gamble,* the Tenth Circuit also refused to dismiss the indictment by exercising its supervisory power over the administration of criminal justice, despite its acknowledgement of the impropriety of the inspectors' conduct. This holding was compelled by *United States v. Payner,* 447 U.S. 727 (1980), in which the Supreme Court ruled that the courts' supervisory power could not be used as a sub-constitutional rule to exclude evidence where the defendant had no standing to challenge the concededly illegal search which produced the incriminating evidence.[18]

No constitutional provision, no statute, and no supervisory power exist which serve to either prevent or deter an honesty-test type of investigation. Guidelines do not have the force of law. What disincentive exists, then, to discourage law enforcement officials from conducting such honesty test investigations?

The alternative is some court-enforceable standard, applied retrospectively, violation of which would result in the dismissal of any resulting indictment.[19] The recommendation of the U.S. Senate Select Committee to Study Undercover Activities of Components of the Department of Justice in 1982 was only that the substance of the Department of Justice Guidelines governing the initiation of a criminal investigation be enacted into law, but that a violation of the legislation not provide a defense to a criminal prosecution.[20] The Committee did observe that consistent noncompliance could necessitate a reassessment of the Committee's view toward enforceability.[21] That very limited recommendation has not found its way into the statutes as yet. In light of *Gamble,* that time may have arrived and an enforceability provision ought to be considered.

ENDNOTES

[1] United States v. Gamble, 737 F. 2d 853 (10th Cir. 1984).

[2] United States v. Williams, 705 F. 2d 603 (2d Cir.), cert. denied, 104 S. Ct. 524 (1983); United States v. Myers, 692 F. 2d 823 (2d Cir. 1982) cert. denied, 103 S. ct. 2487 (1983): United States v. Alexandro, 675 F. 2d 34 (2d Cir.), cert. denied, 103 S. Ct. 78 (1982); United States v. Janotti, 673 F. 2d 578 (3rd Cir.), cert. denied, 102 S. Ct. 2906 (1982).

[3] Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 97-682, 97th Cong., 2d Sess., pp. 2, 11 (1982) (hereinafter, "Select Committee Report").

[4] Select Committee Report, p. 707. (Emphasis added).

[5] 70 ABA Journal 30 (October 1984).

[6] It is certainly conceivable that there was a proper basis on which to initiate an investigation of Dr. Gamble. For instance, if records of insurance companies in the area revealed that Dr. Gamble appeared as the examining physician in a substantial number of accident claims which the insurance carriers viewed as suspicious, and these suspicions were conveyed to the authorities, then the investigation, it seems to me, was properly motivated and indeed, would be an example of good, imaginative, aggressive law enforcement work. However, that would not alter the thesis expressed herein that there is no restraint which exists to deter honesty test investigations. And, from reading the Tenth Circuit's opinion in Gamble, one is left with the uneasy feeling that this may have been one.

[7] 737 F. 2d at 859. (Emphasis added.)

[8] The ineffectiveness of the entrapment defense to deal with situations where the only evidence of predisposition is the target's unhesitating receptiveness to temptation has been recognized:

"[S]hould the government have the power to tempt previously law-abiding persons, thereby creating a 'predisposition' that previously did not exist? Obviously, the current standard [of entrapment] fails to take into account the degree and ambiguity of the provocation, the complexity and ambiguity of the response, and the effect of repeated assaults on human resistance to temptation."

Gershman, Abscam, the Judiciary, and the Ethics of Entrapment, 91 Yale L.J. 1565, 1583 (July 1982).

[9] A separate but related issue raised by Gamble was the propriety of the agents' conduct in deceiving judges, prosecutors and state licensing authorities who were unknowingly involved in the sting, and what effect, if any, that conduct should have on the defendant's conviction:

"The government used fictitious names to obtain driver's licenses, obtained insurance under those names for automobiles they did not own, orchestrated the production of false accident reports, appeared in court and pleaded guilty to traffic violations, and solicited defendant's aid in making false claims against insurance companies. Of the government agencies involved only the Kansas City, Missouri, Police Department knew the operation. Involved without their knowledge were judges, prosecutors, state licensing authorities, and insurance companies. The government agents submitted the false claims to the insurance companies and lied to the companies about their injuries." 737 F. 2d at 858.

The Tenth Circuit recognized the similarity of this conduct to what was described in United States v. Archer, 486 F. 2d 670 (2d Cir. 1973), a celebrated case in local legal circles:

"[T]he Government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes. The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens' criminal justice system to spill over into disdain for all the participants in the system—including the police, the courts, and the members of the grand jury, all of whom were subjected to the Government's fabrications . . .

"Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part." 486 F. 2d at 677.

The Tenth Circuit shared that final sentiment, observing that the "government agents . . . displayed shocking disregard for the legal system." 737 F. 2d at 859. However, echoing what the Second Circuit held in 1981 in dealing with Archer's federal habeas attack on his subsequent New York State conviction. (Archer v. Commissioner of Corrections, 646 F. 2d 44 (2d Cir. 1981)), the Tenth Circuit ruled that the improper conduct of the agents, not being directly inflicted on the defendant, was not grounds for reversal.

[10] There would be no constitutional objection to the following kinds of investigations conducted without reasonable suspicion of any particular person's wrongdoing, nor should there be: an undercover fencing operation which exposes possessors of stolen property; undercover narcotics operations whereby agents pose as customers looking for street sources; an undercover construction-trades business enterprise, which exposes organized crime infiltration, corruption of municipal inspectors, or union shake-downs.

[11] New York State Penal Law § 155.50 subd. 2(b).

[12] Title 18, United States Code, Section 641.

[13] See New York Times, May 20, 1983, p. B3, announcing the arrest of twenty-nine people in the Southern and Eastern Districts of New York for such conduct.

[14] U.S. News & World Reports, Sept. 3, 1984, p. 49, quoting Thomas Puccio, former Abscam prosecutor.

[15] Gershman, supra note 6, at 1584–85.

[16] The guidelines state:

"An investigation may be opened when there are facts or circumstances that 'reasonably indicate' a federal criminal violation has occurred, is occurring, or will occur. This standard of 'reasonable indication' is substantially lower than probable cause, but does require specific facts or circumstances indicating a violation." Select Committee Report, p. 506.

"There must be an objective, factual basis for initiating the investigation; a mere hunch is insufficient." Select Committee Report, p. 507.

In the guidelines, there also exists a creature called an "inquiry," which is less than an "investigation." An inquiry permissible when the information does not satisfy the "reasonable indication" standard, but whose responsible handling requires some further scrutiny. An "inquiry" is to be conducted with as little instrusion as the needs of the situation permit. Select Committee Report, p. 511.

[17] Select Committee Report, p. 387, citing the testimony of Deputy Assistant Attorney General Irvin B. Nathan.

[18] The facts in Payner were remarkable for the brazenness of the agents' illegality. As described in Gamble:

"In Payner, government agents sought ot examine materials in a third party's briefcase that they thought might incriminate defendant. To gain access to the briefcase a government agent introduced the owner of the briefcase, Michael Wolstencroft, Sybol Kennedy, a female private investigator who worked for the agent. Wolstencroft and Kennedy spent time together in Kennedy's apartment, where Wolstencroft left his locked briefcase while the two went out to eat at a restaurant. While one government agent acted as a lookout at the restaurant, other agents entered the apartment with a key furnished by Kennedy, took the briefcase to a locksmith who made a key for it, opened the briefcase and photographed documents in it that led to evidence used to convict Payner. Payner, of course, did not have standing to object to the search. The district court found that the United States 'knowingly and willfully participated' in the illegal search. Nonetheless, the Supreme Court refused to affirm the use of the courts' supervisory power to suppress the evidence. It agreed with a government argument that even though the evidence was tainted with gross illegalities, 'such an extension of the supervisory power would enable federal courts to exercise a standardless discretion.' [447 U.S.] at 733." 737 F. 2d at 860.

[19] Concededly, this provides no remedy in the situation where an improperly initiated investigation does not result in an indictment. Only a prospective warrant requirement could possibly prevent that from occurring, but there are compelling reasons why that should not be instituted. See Select Committee Report, pp. 387–89.

[20] Select Committee Report, pp. 377–79; 382–84. The pertinent provisions of the recommendation are:

"The Congress, through its appropriate committees, should consider legislation providing that:

"1. no component of the Department of Justice may initiate, maintain, expand, extend, or renew an undercover operation except,

"(a) when the operation is intended to obtain information about an identified individual, or to result in the offer to an identified individual of an opportunity to engage in a criminal act, upon a finding that there is a reasonable suspicion, based upon articulable facts, that the individual has engaged, is engaging, or is likely to engage in criminal activity;

"(b) when the operation is intended to obtain information about particular specified types of criminal acts, or generally to offer unspecified persons an opportunity or inducement to engage in criminal acts, upon a finding that there is reasonable suspicion, based on articulate facts, that the operation will detect past, ongoing, or planned criminal activity of that specified type; provided that if, during the course of the operation, agents of the Department of Justice wish to offer to a specific individual—who is identified in advance of the offer—an inducement to engage in a criminal act, they may do so only upon a finding that there is a reasonable suspicion, based upon articulate facts, that the targeted individual had engaged, is engaging, or is likely to engage in criminal activity; . . .

"4. a failure to comply with the provisions of this statute shall not provide a defense in any criminal prosecution or create any civil claim for relief."

[21] Select Committee Report, pp. 389, 397.